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CASES

DETERMINED BY THE

CHANCERY DIVISION

AND IN

LUNACY

AND ON APPEAL THEREFROM IN THE

COURT OF APPEAL.

TALLERMAN *v.* DOWSING RADIANT HEAT COMPANY.

C. A.
1899
STIRLING J.
July 19, 20; *Aug.* 1.
C. A.
Nov. 29.

[1899 T. 987.]

Fraud—False Representation—Trade Rivalry—Unfair Competition—Testimonials, Improper Use of—Cause of Action—Interlocutory Injunction.

The plaintiff having invented a system of treating diseases by hot air, there appeared in a medical paper an article containing a favourable account of this system, with particulars of its application to specific cases. The defendant, who was the inventor of a rival system of hot-air treatment, circulated amongst the patients of the plaintiff a pamphlet containing extracts from this article, but the extracts omitted all mention of the plaintiff's name, and were so made as to induce the belief that the article, and the specific statements of fact therein, related to the defendant's system. There was evidence that some of the plaintiff's patients were misled by these extracts, but no evidence of any actual damage. Upon motion for injunction:—

Held, by Stirling J., that, in the absence of any attempt by the defendant to pass off his system as the plaintiff's, the Court ought not to interfere by way of interlocutory injunction.

Franks v. *Weaver*, (1847) 10 Beav. 297; 8 L. T. (O.S.) 510, explained and distinguished.

The principle of *Batty* v. *Hill*, (1863) 1 H. & M. 264, followed.

MOTION.

The plaintiff, Lewis Abraham Tallerman, was the inventor of a mode of treating various diseases by means of superheated

C. A. 1899

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air, and the patentee of an apparatus for carrying this mode of treatment into effect, and in 1893 he formed the plaintiff company, called the Patents and Manufacturers' Development Company, Limited, to develop his invention. His system had been in practical operation ever since that date, and had attracted the favourable attention of many members of the medical profession. In the *Lancet* of August 29, 1896, there appeared an article on the subject by Dr. Knowsley Sibley, in which was contained an account of the Tallerman mode of treatment, and particulars were given of its application to specific cases.

The defendant company was formed in December, 1898, for the purpose of applying a rival mode of treatment, which was patented in 1897 and 1898 by Mr. Herbert John Dowsing, an electrical engineer. The main difference between the two systems was that luminous heat was made use of by Dowsing, whereas Tallerman applied dark or obscure heat. Dowsing's system had been favourably spoken of by some medical men. For the purpose of making Dowsing's system known, the defendant company had circulated three small pamphlets, in regard to each of which the plaintiffs made some complaint. The first pamphlet was entitled "The Dowsing Radiant Heat System," and it contained an extract from the *Daily Mail* of January 17, 1899. The extract was headed "Rheumatism Riddled with Electric Rays," and it stated that Dr. Knowsley Sibley, senior physician at the North-West London Hospital, had contributed an article to the *Lancet* on this system, whereas in fact the article related to Tallerman's system. The second pamphlet, which was entitled "The Radiant Heat Treatment (Dowsing's Patents)—Extracts from the Medical Press," contained what purported to be an "extract from an article published in the *Lancet* by W. Knowsley Sibley, M.A., M.D., B.C. Camb., M.R.C.P. Lond. (Senior Physician to Out Patients at the North-West London Hospital), on Local Hot-air Treatment for Rheumatism, Gout, and Allied Affections." The extract omitted from the title the name of the plaintiff Tallerman, which appeared in the title of the original article, and also any mention whatever of the plaintiff Tallerman or his system.

The extracts had been so made that the reader would naturally be led to believe that certain statements of fact which appeared in the article related to the defendants' system, whereas in fact they related to the plaintiffs'. For example, on page 4 of the pamphlet the following passage occurred: "A period of two years has enabled me to form a definite opinion that the value of the treatment is not merely a temporary one, but is of a more or less permanent nature." Again, on page 6 there appeared this passage: "I must add that I have never seen results so immediate and satisfactory produced by any other treatment. It is now two years since treatment by the local hot-air bath was commenced in the first case, and yet the patient continues comparatively free from the complaint, and even the deformity of the fingers has greatly disappeared." At that time Dr. Sibley had had nothing to do with the defendants' system, and he was referring exclusively to the plaintiffs' treatment; but in the pamphlet it was made to appear, though not so stated in terms, that these extracts had reference to the defendants' system. The third pamphlet was entitled "The Dowsing Radiant Heat Company (Limited)—Extracts from the Journal of Balneology and Climatology," and it contained what purported to be a report of a speech made at a meeting of medical men by Dr. Knowsley Sibley. In that speech as delivered specific references were made to the systems both of the plaintiff and the defendant company; but in the report in this pamphlet both had been struck out.

Under these circumstances the plaintiffs commenced this action, and moved for an injunction to restrain the defendants until the trial of the action from printing, publishing, issuing, or circulating any pamphlet, notice, circular, or advertisement which contained any press notice, testimonial, or other document, or any extract therefrom, originally written in favour of the plaintiffs' hot-air treatment, or in which any use was made of the reputation of the plaintiff Tallerman or his hot-air treatment, or which should represent, or suggest, or lead to the belief that any press notice, testimonial, or other document, or any extract therefrom, originally written in favour of the plaintiffs' hot-air treatment, was written in favour of, or in

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any way applied to, any treatment of the defendants. The plaintiffs' evidence shewed that these pamphlets had been sent to persons who had been treated by the plaintiffs' system, some of whom had been misled into the belief that Dr. Sibley's article and speech related to the defendants' process; and, further, that the circulation of these pamphlets among such persons was attributable to the exertions of a Mr. Pritchard, who was formerly secretary of the plaintiff company, but who had since entered the service of the defendant company.

Upjohn, Q.C., and *W. H. Cozens-Hardy*, for the plaintiffs. The statements in the pamphlets are fraudulent untruths involving damage to the plaintiffs, and are actionable according to the principles laid down in *Pasley* v. *Freeman*. (1) This is an attempt to appropriate for the Dowsing system the reputation acquired by the Tallerman system; it is a species of unfair competition. This case falls within *Franks* v. *Weaver* (2), where specific relief was granted in respect of the improper use of testimonials.

[They also cited *Society of Accountants in Edinburgh* v. *Corporation of Accountants*. (3)]

Jenkins, Q.C., and *Ingpen*, for the defendants. Upon the present materials this motion must fail as a matter of law. The defendants are not seeking to pass off their invention as the invention of the plaintiffs, but are saying that it is different from the plaintiffs'. As a matter of law it is not actionable to use testimonials given to another tradesman or to alter testimonials. If the defendants had invented the testimonials, the damage to the plaintiffs would have been greater; yet even that would not be actionable.

Franks v. *Weaver* (2) proceeded on the principle that the defendant must not pass off his goods as the plaintiff's, and the relief granted in respect of the testimonials was ancillary to that principle; otherwise that decision is not in accordance with modern authorities. This is a trade dispute, and the relief claimed must be brought within the principles known to

(1) (1789) 3 T. R. 51; 2 Sm. L. C. 10th ed. p. 64; 1 R. R. 634.

(2) 10 Beav. 297; 8 L. T. (O.S.) 510.

(3) (1893) 20 R. 750.

the law. There may be many cases of damage caused by a rival trader in which no relief will be granted. This Court does not sit merely to restrain the publication of untruths; there must be some misrepresentation as to the plaintiffs' business, or some representation that the defendants' business is the same as the plaintiffs': *White* v. *Mellin* (1); *Ajello* v. *Worsley* (2); *Birmingham Vinegar Brewery Co.* v. *Powell.* (3)

Upjohn, Q.C., in reply. Passing off is a very common form of fraud, but there are other instances of fraud which will be restrained by injunction; "it is the fraud, not the manner of it, which calls for the interposition of the Court": *Reddaway* v. *Banham* (4), per Lord Macnaghten. The history of the law of trade-mark, which is founded on the law of false representation, shews that the remedy is not necessarily confined to the person to whom the representation is made: *Singer Manufacturing Co.* v. *Wilson* (5), per Mellish L.J. The principle of that case is applicable to the present.

Cur. adv. vult.

Aug. 1. STIRLING J. (after stating the facts). Whatever may be the legal merits of the case, the plaintiffs have, I think, reason to complain of what the defendants have done. The statements complained of are, to say the least, inaccurate, and the use made of the extracts from Dr. Sibley's article and speech was calculated to cause annoyance to the plaintiffs, and the employment of Pritchard was also calculated to arouse their suspicions. The case, however, is admitted not to be one in which the defendants are seeking to pass off their treatment or apparatus as and for the plaintiffs'. Neither can it be said that their pamphlets contain false statements as to the plaintiffs' business; the false statements relate to the defendants' business. But it is argued on behalf of the plaintiffs that the defendants are making statements, false to their knowledge, which will cause damage to the plaintiffs, and the judgments in *Pasley* v. *Freeman* (6) were referred to, particularly that of Buller J., in which it is laid down that "fraud without damage,

(1) [1895] A. C. 154.
(2) [1898] 1 Ch. 274.
(3) [1897] A. C. 710.
(4) [1896] A. C. 199, 221.
(5) (1876) 2 Ch. D. 434, 453.
(6) 3 T. R. 51, 56; 1 R. R. 634.

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or damage without fraud, gives no cause of action; but where these two concur, an action lies." The principle established by that case is stated by Parke B. in *Langridge* v. *Levy* (1) to be that a mere naked falsehood is not enough to give a right of action; but it is so if it be a falsehood told with intention that it should be acted on by the party injured, and that act must produce damage to him. Here, however, the statements complained of were not intended to be acted on by the plaintiffs, and have not been acted on by them. But it was said that the application of the principle went beyond this, and reference was made to some observations of Mellish L.J. in *Singer Manufacturing Co.* v. *Wilson* (2), where he was considering the case of the wrongful user of a trade-mark, or a representation that the goods sold by the defendant were goods manufactured by the plaintiff. The Lord Justice there said: "Originally, I apprehend, the right to bring an action in respect of the improper use of a trade-mark arose out of the common law right to bring an action for a false representation, which, of course, must be a false representation made fraudulently. It differed from an ordinary action for false representation in this respect, that an action for false representation is generally brought by the person to whom the false representation is made; but in the case of the improper use of a trade-mark, the common law courts noticed that the false representation which is made by putting another man's trade-mark, or the trade name of another manufacturer, on the goods which the wrongdoer sells, is calculated to do an injury, not only to the person to whom the false or fraudulent representation is made, but to the manufacturer whose trade-mark is imitated; and, therefore, the common law courts held that such a manufacturer had a right of action for the improper use of his trade-mark." It was sought to extend that principle to the case before me, and I have now to inquire whether any authority can be found for such an extension.

The case relied on on behalf of the plaintiffs was *Franks* v. *Weaver* (3), before Lord Langdale. There the plaintiff com-

(1) (1837) 2 M. & W. 519. (2) 2 Ch. D. 434, 453.
(3) 10 Beav. 297; 8 L. T. (O.S.) 510.

plained that the defendant, who made a medical preparation similar to that made by the plaintiff, made it up in such a way as to bring upon the wrappers the plaintiff's name, and also caused to be inclosed within the wrappers copies of testimonials given by eminent medical men in favour of the plaintiff, and no doubt an improper use was there made of those testimonials. But it seems to me that the user there was of a totally different kind from that which occurs in the present case. Lord Langdale says (1): "It seems to me to be perfectly clear that nobody can look at all these circumstances, without observing that the name and the testimonials of the plaintiff are so *craftily* applied—for that is the word which is properly applicable here—so craftily applied, that they were well calculated to produce in the minds of ordinary readers, who are generally the majority of those who would read it—they were calculated to produce in the minds of persons who are ordinary readers, the impression that the mixture or solution prepared and sold by the defendant is the same as the mixture or solution to which these testimonials apply, that is to say, the mixture or solution of the plaintiff." A little further on he says: "The fraud certainly consists in the *crafty* adoption of these words in such a manner as to say the thing he makes is prepared by the plaintiff; he issues it in such a way, that it is difficult for any person who is not a critical reader to find out that he does not mean to do that." Finally he says: "I believe that this falls within the principle of the former cases of this kind; that he is doing that ordinarily and constantly which is calculated to make persons believe, that when he is selling his own article, he is in fact selling the article of the plaintiff." The basis of that judgment was that the defendant was selling his own goods as those of the plaintiff. It is admitted that this case does not fall within that principle, but what was much pressed upon me was that after granting an injunction in the ordinary form the Master of the Rolls, according to the report in the *Law Times*, went on to grant an injunction to restrain the defendant from publishing or circulating any cover, wrapper, and so forth containing any testimonial in favour of the plaintiff's medical preparation, or

(1) 8 L. T. (O.S.) 511.

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in which any use was made of the character and reputation of the plaintiff. I have compared the report in the *Law Times* with the order as it appears in the registrar's book, and I find there a few more words added. It ran there, not merely "in which any use is made of the character and reputation of the plaintiff," but these words follow: "As applicable to any preparation or compound of the defendant or his firm." I do not know that the addition of these words is very material, but it seems to me that the justification for thus modifying the ordinary form of injunction must be found in this, that the Master of the Rolls came to the conclusion that the use of the character and reputation of the plaintiff there complained of was a means of passing off the goods of the defendant as those of the plaintiff. I cannot arrive at this conclusion upon the facts now before me, and therefore I do not regard *Franks* v. *Weaver* (1) as an authority which guides me in the present case.

On the other hand, I find an authority which seems to me to point the other way. I refer to the case of *Batty* v. *Hill* (2), before Lord Hatherley, when Vice-Chancellor. That certainly was a very gross case. The plaintiff there, who was a maker of pickles, had had awarded to him a prize medal at the International Exhibition of 1862. He and another were the only persons who obtained prize medals in respect of their manufactures, and the defendant Hill was advertising his goods as having obtained prize medals. The Vice-Chancellor says this (3): "I ought to be careful as to acting in this case. On the question of balance of convenience I should be decidedly in favour of the plaintiff; the inconvenience to the defendant would be merely the necessity of telling the truth. It is however no part of the duty of this Court to enforce the observance of the dictates of morality; and though the old maxim, 'Rem facias, rem, si possis, recte; si non, quocunque modo, rem' (Hor. Ep. I. i. 65), seems to apply in full force to modern times, I can only interfere when some private right is thereby infringed." Then, after some remarks upon the evidence, he says: "As I

(1) 10 Beav. 297; 8 L. T. (O.S.) 510.
(2) 1 H. & M. 264.
(3) 1 H. & M. 268.

have come to the conclusion that there is no substance whatever in the charge of a previous attempt to pass off the defendant's goods as the plaintiff's, I must deal with the present case without the only element which would enable me to make the order which is now applied for." So that the Vice-Chancellor, in a case in which a flagrant untruth was stated, and one which would seem calculated to cause damage to the plaintiff complaining there, refused to interfere, at all events, by way of interlocutory injunction. The Legislature afterwards came to the relief of the plaintiff in that case, and passed an Act prohibiting any such misrepresentation as to prize medals in the future; but as the law then stood it seems to be an authority. In the present case there is no evidence of any actual damage having been suffered by the plaintiffs, and, having regard to the nature of the statements complained of, I entertain great doubt whether any actual damage will ever accrue to them. Under these circumstances I think that I ought not to interfere by way of interlocutory injunction, and I therefore make no order on the motion, but I specially reserve the costs to be dealt with at the trial.

H. B. H.

The plaintiffs appealed.

Nov. 29. The appeal was in the paper for hearing on this day. It was agreed that it should be treated as an appeal against a judgment for the defendants at the trial of the action.

The appeal was not heard, but, on the defendants giving a perpetual undertaking not to print, publish, issue, or circulate any pamphlet, notice, circular, or advertisement containing any press notice, testimonial, or other document, or any extract therefrom, originally written in favour of the plaintiffs' hot-air treatment, it was ordered that the defendants should pay to the plaintiffs 25*l.* for their costs of the action, and that all further proceedings in the action should be stayed.

The plaintiffs were to be at liberty for one month from the date of the order to advertise in any manner they might think proper a statement of the names of the parties to the action, that the action was for an injunction, and the contents of this

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order, but without making any comment thereon, and save as aforesaid the plaintiffs agreed not to advertise or publish the order.

Solicitors: *Davidson & Morriss; H. C. Lambert.*

W. L. C.

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THOMAS *v.* SUTTERS.

[1899 T. 960.]

Local Authority — London County Council—By-law—Validity—Municipal Corporations Act, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16—*Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 23.

A by-law made by the London County Council provided that "no person shall frequent and use any street or other public place, on behalf either of himself or any other person, for the purpose of bookmaking, or betting, or wagering, or agreeing to bet or wager, with any person, or paying or receiving, or settling bets":—

Held, that this by-law was within the power conferred by s. 23 of the Municipal Corporations Act, 1882 (applied to county councils by s. 16 of the Local Government Act, 1888), to make by-laws for the "good rule and government" of the county; that it was not repugnant to s. 23 of the Metropolitan Streets Act, 1867, and was reasonable, and therefore valid.

Decision of Kekewich J. affirmed.

White v. *Morley*, [1899] 2 Q. B. 34, and *Burnett* v. *Berry*, [1896] 1 Q. B. 641, approved.

Strickland v. *Hayes*, [1896] 1 Q. B. 290, and *Calder and Hebble Navigation Co.* v. *Pilling*, (1845) 14 M. & W. 76, distinguished.

APPEAL against a decision of Kekewich J., the question being whether a by-law made by the London County Council was valid.

The action was brought for the dissolution of a partnership between the plaintiff and the defendant, and the taking of the partnership accounts.

By his defence the defendant said that the principal business of the partnership, and for the carrying on of which it was founded, consisted of betting transactions in streets and public places within the county of London; and in the course of the

business both the plaintiff and the defendant necessarily frequented and used the said streets and public places for the purposes of betting, and of paying and receiving payments of bets. He then stated the following by-law made by the London County Council: "no person shall frequent and use any street or other public place, on behalf either of himself or of any other person, for the purpose of bookmaking or betting, or wagering, or agreeing to bet or wager, with any person, or paying, or receiving, or settling bets." The defendant submitted that under the circumstances the partnership was illegal, and the plaintiff was not entitled to maintain the action.

By his reply the plaintiff insisted that the by-law was invalid.

The preliminary point of law, whether the by-law was invalid, was set down for argument before Kekewich J. The by-law purported to be made under s. 23 of the Municipal Corporations Act, 1882, which, by s. 16 of the Local Government Act, 1888, is applied to county councils.

Kekewich J., following *White* v. *Morley* (1), held that the by-law was valid.

The plaintiff appealed.

G. H. Stutfield (*Joseph Walton, Q.C.*, with him), for the plaintiff. The question is whether the by-law is valid. It is admitted that, if it is, it applies to the plaintiff's business.

Kekewich J. could not be asked to overrule *White* v. *Morley* (1), and he simply followed it.

The by-law purports to be made under the power conferred by s. 23 (2) of the Municipal Corporations Act, 1882, which,

(1) [1899] 2 Q. B. 34.

(2) By s. 23, "The council" (that is, of a borough) "may, from time to time, make such bye-laws as to them seem meet for the good rule and government of the borough, and for prevention and suppression of nuisances not already punishable in a summary manner by virtue of any Act in force throughout the borough. . . ."

By s. 16 of the Local Government Act, 1888, "A county council shall have the same power of making bye-laws in relation to their county, or to any specified part or parts thereof, as the council of a borough have of making bye-laws in relation to their borough under s. 23 of the Municipal Corporations Act, 1882. . . ."

By s. 23 of the Metropolitan Streets Act, 1867, "any three or more persons assembled together in any part of a street within the metropolis for the purpose of betting shall be deemed to be obstructing the street," and liable to a penalty.

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by s. 16 of the Local Government Act, 1888, is applied to county councils.

It is submitted that the by-law goes much too far. It is not confined to persons carrying on a business of betting or bookmaking. It would apply to a man who two or three times in the course of a day went into a street for the purpose of making a bet with a bookmaker, without creating any disturbance or causing any assemblage of persons so as to obstruct the street. The by-law goes far beyond the "good rule and government" of the county; it extends to that which is not necessary for the "good rule and government" of the streets. A by-law cannot be validly made for merely moral purposes—pro salute animarum. The local authority has no power to prohibit things which may be bad in themselves, but are not illegal; it has no power to enforce morality. A by-law must be limited to cases of obstruction, nuisance, or scandal. If it be in the interest of morality to put a stop to pernicious habits, such as gambling, still that is not within the power conferred by s. 23 of the Municipal Corporations Act, 1882, and the by-law is unreasonable and ultra vires: *Calder and Hebble Navigation Co.* v. *Pilling* (1); *Macdonald* v. *Lochrane* (2); *Heap* v. *Burnley Union* (3); *Johnson* v. *Croydon Corporation* (4); *Strickland* v. *Hayes*. (5)

By s. 23 of the Metropolitan Streets Act, 1867, the Legislature have dealt with betting in the streets of the metropolis in a limited way, and this by-law has gone much further, and is repugnant to that section. The by-law might be valid if it were limited to cases of obstruction of the streets, but it goes much further than that.

It is submitted that *White* v. *Morley* (6) and *Burnett* v. *Berry* (7) were not rightly decided, and that some of the observations of Lord Russell C.J. in *Kruse* v. *Johnson* (8) were not well founded.

A. T. Lawrence, Q.C., and *H. S. Cautley*, for the defendant, were not called upon.

(1) 14 M. & W. 76.
(2) (1887) 51 J. P. 629.
(3) (1884) 12 Q. B. D. 617.
(4) (1886) 16 Q. B. D. 708.
(5) [1896] 1 Q. B. 290.
(6) [1899] 2 Q. B. 34.
(7) [1896] 1 Q. B. 641.
(8) [1898] 2 Q. B. 91.

LINDLEY M.R. I think this case does not present any difficulty. I agree with Mr. Stutfield that in considering the validity of any by-law we must have regard to the power which is given to make it. The power to make the by-law now in question is conferred by s. 23 of the Municipal Corporations Act, 1882, on the council of a borough. By s. 16 of the Local Government Act, 1888, the same power is given to a county council in relation to their district as the council of a borough have in relation to the borough. Therefore, the power depends upon the true construction of s. 23 of the Act of 1882. I cannot conceive any reason why we should limit the language of that section—why we should not give it full effect. If authority is wanted for so construing it and similar sections, we have it in *Kruse* v. *Johnson*. (1) Now, what is there in this by-law which can be said to be unreasonable or objectionable, having regard to that decision and to the very wide power of making by-laws which is conferred by s. 23? It is one of a set of by-laws which purport to be made by the London County Council for the good rule and government of the county of London. Under that section they may make "such by-laws as to them seem meet" for that purpose. They have thought fit to make this by-law about street betting. [His Lordship read the by-law.]

Now the governing and important words in it are, "frequent and use any street . . . . for the purpose of betting." The by-law does not prevent two people who are walking down the street from either making a bet or paying one. If they choose to amuse themselves in that way, they can do it, so far as I can see. But they must not frequent or use the street for that purpose. That is the by-law.

It is said that there is something unreasonable in it. Of the authorities, *Burnett* v. *Berry* (2) and *White* v. *Morley* (3) are in favour of its validity. We are asked to overrule those cases. Why should we do so? Mr. Stutfield has done his best for his client; but his arguments when examined are reduced to this—that the decision (in which I took part) in *Strickland* v.

(1) [1898] 2 Q. B. 91. (2) [1896] 1 Q. B. 641.
(3) [1899] 2 Q. B. 34.

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Hayes (1) goes the whole length that he requires. He puts his argument very ingeniously in this way. He says that there is an Act of Parliament, namely, the Metropolitan Streets Act, 1867, which deals with betting in streets, and, as Parliament has directed its attention to betting in streets and has regulated it in the mode which it thought best, there ought to be no further by-law upon that subject, except possibly one for the better carrying out of that provision. There is, no doubt, some weight in that argument, and in *Strickland* v. *Hayes* (1) I thought a good deal turned upon it. Although I have not now, as I had not then, the slightest doubt that the by-law then in question was hopelessly bad, I thought it was necessary to consider whether it might not be amended, and whether, if amended, it would be valid. And the reason why I came to the conclusion that, even if amended, it would still be bad was this—that it dealt precisely with a matter with which Parliament had already dealt in an Act addressed to the very same thing, and I based my decision on that reason so far as the amended by-law went.

But the difference between that case and the present is obvious enough. In s. 23 of the Act of 1867 Parliament was not aiming at betting at all: it was aiming at street traffic. The whole object of the Act was to regulate the street traffic in the Metropolis: that was the whole purpose of the Act. It is true that in s. 23, and with reference to the traffic, it is enacted that "any three or more persons assembled together in any part of a street for the purpose of betting shall be deemed to be obstructing the street," but that was only with a view to regulating the traffic. I decline to extend the decision in *Strickland* v. *Hayes* (1), which I think was perfectly right, to the length of holding that, because there is a regulation of that kind in a traffic Act, therefore the county council have no power to regulate their streets with reference to another matter —namely, betting without obstruction.

Looking at this case as a whole, it appears to me that we should be going a great deal too far if we were to say that this by-law is not and cannot reasonably be construed as made for

(1) [1896] 1 Q. B. 290.

the "good rule and government" of the county of London. The county council have ample power to say that in their opinion it is so made, and unless there is some good reason to the contrary—unless there is some clear excess of jurisdiction —we ought rather to uphold than to invalidate the by-law. In my opinion the by-law is perfectly good, and the appeal must be dismissed with costs.

SIR F. H. JEUNE. I agree. Though I thought that this matter was entirely governed by several recent decisions, and that the ghost of these objections to by-laws had by this time been fairly laid, objections of the kind which have been dealt with over and over again have been very forcibly put to us to-day.

In the first place, it is said that this by-law is too wide, or rather that it deals with matters outside the powers of the county council, because their powers are limited to the making of by-laws for the "good rule and government" of the county, and that this by-law deals with matters outside the good rule and government of the county. It is suggested that it deals rather with the morals of the community than with the good rule and government of the county. I am not certain that even in that narrower sense this by-law is not perfectly justifiable (quite apart from any question of the morality of the inhabitants or the respectability of the district) on the ground that it deals with matters which may cause annoyance or obstruction. But for myself I do not shrink from saying that I cannot take such a limited view of the powers of the council. Such a case as *Calder and Hebble Navigation Co.* v. *Pilling* (1) appears to me entirely different. I agree that power is given to a navigation company to make by-laws for the good management of their canal—that is, matters relating to the supply of water and so forth, and not to the morality or good behaviour of the persons who use the canal. The latter are outside their functions. They are matters for the general law and not for the canal company, whose business it is to keep their canal going, and not to provide for the good behaviour or morals of those who

(1) 14 M. & W. 76.

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use it, or anything of that kind. But the power of a municipality dealing with the good order of their streets appears to me to go far beyond that. I should hesitate long before saying that a municipality had not a perfect right, and, indeed, a duty, to deal with matters which affect the respectability and moral conduct of the persons in their streets—that is, in so far as they are matters of public interest and affect the persons who use the streets.

Then it is said that Parliament has already dealt with this matter, and in such a way that a by-law ought not to deal with it again. I agree that would be so if there were a difference between the by-law and the statute. If a by-law provided that something should be legal which the public law had declared to be illegal or vice versâ, it might well be said that the by-law could not set itself up against an Act of Parliament. But there is nothing of that kind in the present case. As the Master of the Rolls has pointed out, the Act of 1867 deals with traffic regulation, and it provides that three or more persons assembled together in a street for betting shall be deemed to be obstructing the street. That provision was intended solely for the purpose of keeping the streets clear. It may be that the present by-law goes beyond that, but I cannot see any objection to it, even if it does go somewhat beyond that Act. An Act of Parliament speaking for the whole country renders certain things illegal. It does not at all follow that a by-law speaking for a particular locality may not make some more stringent regulations with the same object. That, as it seems to me, is perfectly within the competency of the local authority. When an Act of Parliament has forbidden certain things to be done in certain places, it seems to me perfectly consistent with that that a municipality, with regard to their particular locality, should go somewhat beyond the Act, not contravening its spirit, but carrying it out, and making regulations somewhat wider than those to be found in the Act. That is really what has been done in this case. The Act has forbidden the assembling together of people in the streets for the purposes of betting; the municipality, acting in the same spirit, but no doubt going somewhat further, have

provided that—"no person shall frequent and use any street for the purpose of betting," or matters connected therewith. This matter has been dealt with by more than one judicial authority. I refer especially to the judgment of Darling J. in *White* v. *Morley* (1), and I desire to express my acquiescence in his opinion on this point.

Mr. Stutfield has fallen back on an objection which I think has also been disposed of by previous decisions. He has said that the by-law is too wide, and that it ought to contain some words limiting its effect to the case of nuisance or annoyance being caused by the act which it forbids. That is exactly the point which was dealt with in *Kruse* v. *Johnson*. (2) In that case a by-law made by a county council prohibited any person from playing music or singing "in any public place or highway within fifty yards of any dwelling-house after being required by any constable, or by an inmate of such house personally, or by his or her servant, to desist," and the objection taken was that there were no such limiting words as Mr. Stutfield has insisted that there should be here. It was said that you could not by a by-law prohibit music altogether, not even if persons took objection to it, and that the by-law must contain some such words as "if nuisance or annoyance is caused thereby." In that case I thought it was sufficient to say that the fact that the by-law required that some person should complain was evidence that to that person, at any rate, annoyance would be caused. I might have gone further (and I am not sure I did not), for I find I said (3): "It is not necessary that a requirement of evidence of actual annoyance should be prescribed in terms; it is enough if the circumstances render annoyance certain, or even probable." I desire to repeat that now. I will not quote again the authorities which I then cited as bearing out that proposition. In the present case it seems to me sufficient to say that it is a reasonable view to take that, if persons assemble together in a street for the purpose of betting, it is certain, or at any rate probable, that annoyance will be caused, and that it is not unreasonable for a municipality to make a

(1) [1899] 2 Q. B. 34. (2) [1898] 2 Q. B. 91.
(3) [1898] 2 Q. B. 105.

C. A. 1899 THOMAS v. SUTTERS. Sir F. H. Jeune.

by-law forbidding the use of their streets for the purpose of betting, without expressly limiting its operation to the case of actual annoyance being caused. The nature of the thing is such that, if it is done, it is highly probable—nay, almost certain—that annoyance will be caused. That is sufficient to justify a by-law absolutely prohibiting the thing from being done.

For these reasons I am of opinion that *Burnett* v. *Berry* (1) and *White* v. *Morley* (2) were rightly decided, and for the right reasons. I think, therefore, that Kekewich J. was right, not only in following those authorities, but in expressing his approval of them.

ROMER L.J. Under the power conferred by the Acts of 1882 and 1888, I think that a local authority may make a by-law to prevent their public streets or places from being habitually used, not in the ordinary way for the purpose of passing to and fro, but for the purpose of carrying out transactions which, though they may not be illegal in themselves, tend against the morality of the locality and the welfare of its inhabitants. On this ground alone I think that the London County Council were entitled to make a reasonable by-law preventing the public streets or places under their control from being frequented and used for the purpose of carrying on or carrying out betting transactions. Moreover, I think that the by-law in question is not too wide in its terms or unreasonable, and it is certainly not repugnant to s. 23 of the Metropolitan Streets Act, 1867. I agree that the appeal should be dismissed with costs.

Solicitors: *Lewis & Lewis; C. B. Peachey.*

(1) [1896] 1 Q. B. 641. (2) [1899] 2 Q. B. 34.

W. L. C.

LITTLEDALE *v.* LIVERPOOL COLLEGE.

C. A. 1899 Nov. 13, 20.

[1898 L. 1866.]

Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3—*Dispossession of Land—Inference from Equivocal Acts.*

The defendants were the owners of two fields between which was a strip of land separated from them by hedges. This strip had been conveyed to the defendants with the fields, but the plaintiffs had a right of way over it to a field belonging to them. The strip was originally open at both ends, the end farthest from the plaintiffs' field communicating with a public road. More than twelve years before the commencement of the action the plaintiffs had erected a gate at each end of the strip, and had since kept these gates locked, the keys being retained by themselves or their tenants. The gate at the road end of the strip was placed upon the strip; it was not clear whether the other gate was placed on the strip or on the plaintiffs' own land. The action was brought to restrain the defendants from trespassing on the strip. There was no evidence that the plaintiffs had erected the gates with the intention of excluding the defendants from the strip:—

Held, that, as the act of the plaintiffs in erecting and locking the gates was in its nature equivocal and might have been done merely with the intention of protecting the plaintiffs' right of way from invasion by the public, the defendants had not been dispossessed of the strip of land, and the plaintiffs had not acquired a title to it under the Statute of Limitations.

The action was accordingly dismissed.

Appeal against the judgment of Bigham J. at the trial of the action. The action was originally assigned to Byrne J., and was tried at the Liverpool Assizes.

The plaintiffs claimed an injunction to restrain the defendants from trespassing upon a strip of land of which the plaintiffs alleged that they were the owners in fee. The defendants, on the other hand, alleged that they were the owners of the strip of land.

It was admitted that the documentary title shewed that the defendants were the owners in fee of the strip. On the other hand, the defendants admitted that the plaintiffs were entitled to a right of way for agricultural purposes over the strip to a field belonging to them. The question was, whether the

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plaintiffs had acquired a title in fee to the strip under the Statute of Limitations.

The following statement of facts is taken in substance from the written judgment of Lindley M.R. :—

The land in dispute was a narrow strip open at both ends, situate between two fields belonging to a Dr. Solomon, a predecessor in title of the defendants, and having hedges the whole length of the strip. The strip led from a public road called Penny Lane to a piece of land belonging to a person named Sinclair and adjoining these two fields, but separated by them from Penny Lane. In 1843 this piece of land, which was then pasture, was conveyed to the plaintiffs or their predecessor in title. The strip of land was grass, and was the means of access to the plaintiffs' field from Penny Lane. Formerly, so far as appeared, there was not any other access to the plaintiffs' field except along this strip; but before 1843 other roads leading to the field from other places were laid out, and the strip in question became comparatively unimportant as a road to the field. It was admitted that the conveyance of 1843 did not include this strip of land, and that, so far as the title thereto was shewn by the documents, it belonged to the defendants and not to the plaintiffs. On the other hand, it was conceded that the plaintiffs were entitled to a right of way along the strip of land. The plaintiffs, however, claimed to make a title to the land in dispute under the Statute of Limitations. They relied upon several acts of user, and particularly upon the erection and locking of the gates.

In 1861 Dr. Solomon conveyed part of one of his two fields to the London and North Western Railway Company, and the plan on this conveyance shewed the strip as an "occupation road." This conveyance was not produced in the action. Apparently the strip was of no use to Dr. Solomon, and he did not appear to have used it, or to have paid any attention to it for many years, nor had his trustees done so since his death. It was conceded that, unless the plaintiffs had acquired a title to the strip by the Statute of Limitations, it belonged to the defendants, who claimed under Dr. Solomon, and not to the plaintiffs.

Hughes, *Q.C.*, and *A. L. Briscoe*, for the plaintiffs. The evidence shews that the defendants have been dispossessed by the plaintiffs or their predecessors in title, and the plaintiffs have acquired a title in fee under the Statute of Limitations.

[They were stopped by the Court.]

McCall, *Q.C.*, and *W. H. Cochran*, for the defendants. Very slight evidence of acts of ownership on the part of the person who is really the owner of land is sufficient to shew that he has not discontinued possession or been dispossessed: *Leigh* v. *Jack*. (1) The acts relied upon by the plaintiffs were of an equivocal nature. The gates may have been put and kept locked merely in order to prevent the public from trespassing.

Hughes, *Q.C.*, in reply. The locking of the gates operated as an exclusion of the defendants, and there are other acts pointing in the same direction: *Rains* v. *Buxton*. (2) Exclusive possession is sufficient. Inclosure is the strongest possible evidence of exclusion or adverse possession, though it is not indispensable: *Seddon* v. *Smith*. (3) Acts done by a tenant enure for the benefit of his landlord. After a title has been acquired under the statute an acknowledgment will not restore the title which has been extinguished: *Sanders* v. *Sanders*. (4)

Cur. adv. vult.

Nov. 20. LINDLEY M.R. read a judgment, in which (after stating the facts substantially as above) he continued:—

In order to acquire by the Statute of Limitations a title to land which has a known owner, that owner must have lost his right to the land either by being dispossessed of it or by having discontinued his possession of it: see 3 & 4 Will. 4, c. 27, s. 3. I will consider discontinuance by the defendants first. About thirteen or fourteen years ago, when one Lewis was Solomon's tenant, Solomon told him to pull down part of the fence between the strip and his own field, asserting, as the truth was, that the strip was his. Lewis made openings in the fence accordingly. This was long after the gates were put up. This incident disproves discontinuance of possession by Solomon

(1) (1879) 5 Ex. D. 264.
(2) (1880) 14 Ch. D. 537.
(3) (1877) 36 L. T. 168.
(4) (1881) 19 Ch. D. 373, 379.

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Lindley M.R.

at the time in question. It is true that the defendants have done nothing on the strip since this time, but they had no occasion to do so. I cannot infer from the evidence any discontinuance of possession by the defendants or their predecessors either before or after this act of ownership. If the defendants have lost their right to the strip it must be not by reason of any withdrawal or discontinuance of possession on their part, but by reason of their being dispossessed by the plaintiffs or their predecessors. I turn then to what the plaintiffs have done. Many years ago the plaintiffs or their predecessors put up two gates, one at each end of the strip of land in question, and they put locks on these gates, and they were kept locked until recently, when disputes arose. The plaintiffs or their tenants of their field have kept the keys. If the plaintiffs had been strangers, having no right to or over the strip in question, the natural inference would be that they put up these gates in order to exclude every one, and that every one was in fact excluded. But the erection of the gates and the fact that they were kept locked is in this case open to a very different explanation. Let us take the gates separately. The plaintiffs had a right to put up a gate in their own field, and if they put it up there and not actually in the strip of land, they in no way dispossessed the defendants of any land of theirs, nor interfered with any right of theirs, for the defendants had no right to go from the strip of land on to the plaintiffs' field. The evidence does not shew exactly where this gate was. If it was in the strip of land its erection was a trespass and so far an invasion of the defendants' rights, but far short of an eviction from the strip. The gate at the Penny Lane end of the strip may well have been put up to protect the strip and the plaintiffs' right of way over it from invasion by the public, and not to dispossess the defendants. There is evidence to shew that rubbish was thrown on the strip at the Penny Lane end; but there is no evidence to shew that the gate was put up with the intention of dispossessing Solomon, the defendants' predecessor in title. The gate was in fact a protection to his property as well as to the plaintiffs' rights. Nor is it, I think, true to say that, whatever the plaintiffs' intentions may have

been, the defendants or Solomon were in fact dispossessed of the land by the erection of these two gates. They could not be dispossessed unless the plaintiffs obtained possession themselves; and possession by the plaintiffs involves an animus possidendi—i.e., occupation with the intention of excluding the owner as well as other people. The evidence that the plaintiffs never had any such intention is extremely strong. The correspondence shews that until quite recently they only claimed a right of way. Even when they commenced this action they claimed a right of way and no more. It was only at a later stage that they claimed the ownership of the strip. When possession or dispossession has to be inferred from equivocal acts, the intention with which they are done is all-important: see *Leigh* v. *Jack*. (1) I am myself convinced that the gates were put up, not to exclude the defendants, but to protect the plaintiffs' right of way, and to prevent the public from going along the strip of land now claimed by the plaintiffs. The other acts of ownership relied upon by the plaintiffs are far less important. The fact that horses or cattle lawfully on the strip grazed more or less in it does not in my opinion assist the plaintiffs. It is too insignificant. So is the leave given to put up a telegraph pole on the edge of the strip some three or four years ago. So is clipping the fences on the strip sides. The fact that one of the plaintiffs' tenants—namely, Peacop—let the pasturage of the strip to Carruthers some fifteen years ago, and afterwards to Boote, who was a tenant of the defendants, is more important. This, however, was a mere arrangement between two tenants. The reason for it as regards Carruthers is not explained. As regards Boote, he tells us he paid Peacop 5*s*. a year for three or four years for convenience and grazing. He wanted to go along the strip to some buildings on his land, and his cattle got through the fence where Lewis had cut it down, and Peacop complained of this. There is no evidence to shew that the plaintiffs knew anything about either of these arrangements. There is no evidence to shew that the plaintiffs or their predecessors ever themselves let the strip of land or dealt with it as their own otherwise

(1) 5 Ex. D. 264.

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than by shutting it in by the two gates already mentioned and by giving leave to put up a telegraph pole. I have looked at all the decisions I can find which throw any light on this subject. *Leigh* v. *Jack* (1) is the nearest and most instructive. *Rains* v. *Buxton* (2) (the underground cellar case) presented no difficulty except on the point of concealed fraud. The owner of the cellar was there plainly dispossessed by the plaintiff, who took and kept possession of the cellar intending to acquire it for himself. In *Seddon* v. *Smith* (3) and *Norton* v. *London and North Western Ry. Co.* (4) the acts of ownership were unequivocal—there was ploughing up and cultivation of a strip of land. Combining all the evidence adduced by the plaintiffs, I think Bigham J. was right in holding that the plaintiffs had failed to prove the acquisition of a title to the strip of land in dispute. The evidence is not enough to prove that the defendants or their predecessors have been dispossessed for the statutory period of the strip which unquestionably was theirs. The appeal fails, and ought in my opinion to be dismissed with costs.

Sir F. H. Jeune. I have had the opportunity of reading the judgment of the Master of the Rolls, and I am not prepared to differ from it. But I am bound to say that I have arrived at that conclusion with great hesitation. My hesitation of course does not arise from anything connected with the paper title to the property, because it is clear, as the Master of the Rolls has said, that the paper title is in the defendants and not in the plaintiffs. My difficulty has been that, although I am inclined to agree with what has been said as to the animus possidendi, the facts as to the possession of the plaintiffs appear to me extremely strong. Putting the matter broadly, it is hardly too much to say that every act of user has been on the part of the plaintiffs, and that there has been no real user, for the last twelve years, or even a much longer period, on the part of the defendants. No doubt some of those acts of user are of no great importance. The putting up of the telegraph pole and the clipping of the hedges are matters of no great importance.

(1) 5 Ex. D. 264.
(2) 14 Ch. D. 537.
(3) 36 L. T. 168.
(4) (1879) 13 Ch. D. 268.

But the erection of the gates and the grazing are matters which assume a graver aspect. It is true also to say that there has been really no user on the part of the defendants or of their predecessors in title. It is true that there was no temptation to them to use the lane, except so far as they used it for grazing, and the matter cannot be quite lost sight of when we find that their tenants actually thought it worth while to pay something, though not much, for the grazing. These are the undoubted facts, and, if they stood alone, I confess that, when we find on the one side acts of user, and on the other side none, or practically none, I should be much inclined to say that there had been a dispossession—that is, that legally the plaintiffs have been in possession. And, if the defendants during the last twelve years had sought to bring an action of trespass against any one who had trespassed on the land, I think they would have found it difficult to prove that, although they had a legal paper title, they were in possession sufficiently to maintain the action.

These facts have impressed me very strongly, and it is with considerable difficulty that I agree with the judgment of the learned judge in the Court below. But, on the whole, I am not prepared to take the responsibility of differing from him, because all through there has been an undoubted right of way in the plaintiffs as against the defendants, and it is very difficult to distinguish the acts done by the plaintiffs from acts which they would do, and would have a right to do, in exercise of their right of way. That observation is particularly applicable with regard to the gates. If there had been no right of way I should have thought that, when a man puts gates at each end of a strip of land and locks them, he has done as strong an act as he could do to assert his right to the ownership of the land. Such an act, which is, in fact, an inclosure, has always been held to be one of the strongest things that can be done to assert ownership. But when you find that the man who has done this had a right of way over the land, that one end of the piece of land runs out into a public road, and the other into his own land, and that along each side of the piece of land are hedges in which there has been an opening only for a short

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time, if ever, the erection of the gates and the locking and keeping them locked would appear referable rather to the exercise of the undoubted right of way than to acts of user such as to constitute dispossession.

In the same way the grazing, although to a less extent, admits, in my view, of explanation. It was necessary to keep down the grass in order to make the right of way practically exercisable by the person entitled to it. Of course, he would not like the grass to grow to such a length that there remained no path over it.

Under the circumstances, I am not prepared to differ from the judgment of the learned judge in the Court below.

ROMER L.J. As has been pointed out by the learned President, the case is one of difficulty; but I agree in the judgment of the Master of the Rolls, and in the reasons given by him, to which I cannot usefully add.

Solicitors: *Rowcliffes, Rawle & Co., for Stone, Fletcher, Hull & Stone, Liverpool; Wynne, Holme & Wynne, for F. J. Leslie & Co., Liverpool.*

W. L. C.

In re NATIONAL STORES, LIMITED.

C. A. 1899 Nov. 29.

[00155 of 1898.]

Company—Winding-up—Order for Public Examination—Application to Discharge—Time—Companies (Winding-up) Act, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

An application for the discharge of an order for public examination made in chambers, under s. 8 of the Companies (Winding-up) Act, 1890, must be made with reasonable diligence:—

Held, that a delay of two months in making such an application was unreasonable, and that on that ground the application was properly dismissed.

Decision of Wright J., [1899] 2 Ch. 773, affirmed.

Appeals against the decision of Wright J. (1)

On June 17, 1898, an order was made for the compulsory winding-up of the above company, and on May 4, 1899, the official receiver made his further report, which was filed on May 8.

In consequence of this report, an order was on May 8, on the application ex parte of the official receiver, made by Wright J. in chambers for the public examination of several persons, including F. G. Willett and J. W. Taylor and a Mr. Letts, who were named in the report as having taken part in the promotion or formation of the company. On May 17 the official receiver gave notice in writing to Willett and Taylor that the order for examination had been made, adding that they would receive notice of the time and place appointed for holding the examination when they had been fixed. On May 26 Willett and Taylor were served with the order for examination. The examination was fixed for June 7. It was then adjourned to July 17, and was then further adjourned to August 7, notice being duly given to Willett and Taylor. On July 17 counsel for Willett and Taylor attended on their behalf at the public examination, and cross-examined one of the other persons named in the order of May 8. One of the persons

(1) [1899] 2 Ch. 773.

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NATIONAL STORES, LIMITED, *In re.*

then examined was Letts. Willett and Taylor were not then examined. On July 26 Willett served on the official receiver a summons for the discharge of the order for his examination, on the ground that he had not taken part in the promotion or formation of the company, and on July 27 Taylor served a similar summons. The summonses were directed to be heard by the judge.

Wright J. dismissed the summonses on the ground (inter alia) that they had not been served within a reasonable time.

Willett and Taylor appealed.

Muir Mackenzie, for Willett.

Sir R. B. Finlay, *S.-G.*, and *Ingle Joyce*, for the official receiver, took the objection that the applications to discharge the order had been made too late.

Muir Mackenzie, for Willett. There is no express provision in the Rules of the Supreme Court as to the time within which an application to discharge an order made in chambers must be made. No doubt, according to the practice in the Chancery Division, such an application should be made within fourteen days. But that practice does not govern an application to discharge an order in this peculiar jurisdiction in the winding-up of companies. In *In re Great Kruger Gold Mining Co.* (1) an order for public examination was in fact discharged upon an application made after quite as long a delay as in the present case, though the point does not appear to have been taken.

John O'Connor, for Taylor.

Sir R. B. Finlay S.-G., and *Ingle Joyce*, for the official receiver, were not called upon.

LINDLEY M.R. I think that there ought to be reasonable diligence in applying for the discharge of an order of this kind. I do not intend to lay down any rigid rule. If any explanation is given of the lapse of time, or if there is any ground for allowing the ordinary rule as to time to be relaxed, we are always disposed to relax it. But here it is obvious that the

(1) [1892] 3 Ch. 307.

appellants cared nothing about the order until something came out in Mr. Letts' examination. It would not be right for us to assist the appellants in the present case.

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SIR F. H. JEUNE and ROMER L.J. concurred.

Both appeals were dismissed with costs.

Solicitors: *S. A. Clench & Co.; Tottenham & Co.; Solicitor to Board of Trade.*

W. L. C.

NUTT *v.* EASTON.

C. A. 1899 *Dec.* 6.

[1897 N. 1802.]

Mortgage—Power of Sale—Action to Set Aside Sale—Laches.

The mortgagee of a reversionary interest sold it under the power of sale in January, 1888. The reversioner had notice of the sale, and he then took legal advice as to his rights, but he took no steps to impeach the sale until December, 1897, when he commenced an action to set it aside. The reversion had fallen into possession in April, 1897:—

Held, that, by reason of his laches, the plaintiff could not maintain the action.

Decision of Cozens-Hardy J., [1899] 1 Ch. 873, affirmed.

APPEAL by the plaintiff against the decision of Cozens-Hardy J. (1)

The action was brought by a mortgagor to set aside a sale made by the mortgagee under the power of sale.

The mortgage was dated May 15, 1884, and was of a reversionary interest.

In October, 1886, the mortgagor sold and assigned the reversion (subject to the mortgage) to the plaintiff.

On January 24, 1888, the executrix of the mortgagee sold and assigned the reversion to the defendant, who in the same month gave notice of his purchase to the plaintiff. The plaintiff at once took the opinion of counsel as to his position and rights, and was advised that the sale by the executrix could be set aside. The plaintiff took no steps to impeach the sale until

(1) [1899] 1 Ch. 873.

C. A. 1899 NUTT v. EASTON.

he brought this action. In April, 1897, the reversion fell into possession, and in December, 1897, the action was commenced. Cozens-Hardy J. dismissed the action, on the ground (inter alia) of the plaintiff's laches.

The plaintiff in person in support of his appeal.

Astbury, Q.C., and *W. J. Lewin*, for the defendant, were not called upon.

LINDLEY M.R. After such great delay on the part of the plaintiff his appeal is hopeless. It must be dismissed with costs.

SIR F. H. JEUNE and ROMER L.J. concurred.

Solicitors: *J. W. Nutt; Easton & Cargill.*

W. L. C.

ATTORNEY-GENERAL *v.* DAY.

NORTH J.
1899
Oct. 28. 31.

[1717 A. 540.]

Charity—Highway—Repair of Road—Road transferred to Local Authority—Failure of Trust.

The testator bequeathed 3000*l.* upon trust to build galleries in a church and to construct a causeway, and directed that 40*l.* a year should be laid aside for the repairs of the galleries and the road as there should be occasion, and as the trustees should think fit, and gave the residue after these things were performed to other objects. An additional sum of 40*l.* a year out of the funds was subsequently ordered by the Court of Chancery to be applied to the repairs of the road. The road had recently come under the control of a county council and a district council, so that the obligation to repair it rested on these bodies :—

Held, that this circumstance did not put an end to the trust, and that so much of the 80*l.* a year as was available for the repairs of the road ought to be paid to the councils.

PETITION.

William Worts, by his will dated June 21, 1709, devised real estate in Landbeche and Cambridge to his aunt Day, and directed her to pay 30*l.* a year to the use of the children of the charity schools at Cambridge, and after her death he devised the property to four doctors therein named and Sir John Ellis upon certain trusts, and he bequeathed to the same five persons 3000*l.* upon trust to pay out of the annual produce thereof certain annuities, all of which had long since determined; and after the decease of his aunt Day he directed, concerning both the real estate and the 3000*l.*, that the five trustees should continue the payment of the 30*l.* a year to the schools and other annuities, and he proceeded as follows :—

"In the next place I appoint and desire that the annual income both of my said lands and money and the improvements thereof be managed to the best advantage till the sum of 1500*l.* be raised therefrom with which I desire that with all convenient speed after the same is so raised galleries be built in Great St. Mary's Church in Cambridge for the use of the bachelors of arts and undergraduates in the University that they may the more decently and conveniently hear the sermon.

NORTH J. 1899 ATTORNEY-GENERAL v. DAY.

And when the galleries are finished I appoint and desire that as soon as another 1500*l.* can be raised out of the annual income of my said lands and money and the improvements thereof it may be applied to the making a clasey or causeway from Emmanuel College to Hohmagog alias Gogmagog Hills and I desire if there be occasion that an Act of Parliament may be procured for the making and securing that road, and when it is finished I desire that 40*l.* a year be laid aside for the maintenance and repairs of that and the said galleries in St. Mary's Church and expended from time to time as there shall be occasion in such proportion to each as the trustees or major part of them shall think fit." And as soon as the galleries should be finished he further directed the foundation of two travelling fellowships, and the will then proceeded as follows: "And the residue and overplus of what I have given to the said four doctors and Sir John Ellis after these things are performed and all reasonable expenses have been allowed for the management of all matters relating to this my will I desire may be applied to the use of the University Library."

By a decree of the High Court of Chancery made on August 1, 1718, after the death of the testator, it was ordered that the said charities should be established; and, shortly afterwards, the galleries in St. Mary's Church were built and the causeway made by the trustees. These works were, with the sanction of the Court, paid for out of capital to be replaced by accumulating the interest on the surplus.

On March 17, 1742, the trustees presented a petition stating that the galleries had been built and the causeway made for 2000*l.*, that the traffic on the causeway had become very heavy, and that the road could not be kept in repair without a further allowance in addition to the 40*l.* given by the testator, and asked for a further yearly sum out of the unexpended funds. An order was thereupon made by consent that a further sum of 40*l.* a year should be paid out of the dividends on the funds in Court representing the surplus of 1000*l.* to the receiver of the trust estate, to be by him applied towards the repairs of the causeway.

By statutes of the University of Cambridge the trusts for founding travelling fellowships had been altered, and the management of the testator's endowments had been vested in the Chancellor, masters, and scholars of the University through a financial board.

Until 1882 the trust was administered by the trustees. Since that date the financial board had received the income from the funds in court, had paid the 30*l.* to the schools, appropriated 80*l.* a year to the maintenance of the causeway and the galleries, carried 200*l.* a year to the account of the travelling fellowships, and paid the rest of the income to the University Library general fund. The financial board at first repaired the causeway themselves, and afterwards allowed the surveyors of highways for the several parishes through which it passed to take over the management, and accounted to them for the balance of the 80*l.*, after providing for the repair of the galleries. Since 1896 both sums of 40*l.* a year had been accumulated.

Under the Local Government Act, 1888, the causeway had been declared to be a main road, and it was now under the control of the Cambridgeshire County Council and the Chesterton District Council.

The Chancellor, masters, and scholars of the University of Cambridge alleged that the maintenance of the causeway was now provided for, the object of the testator performed, and that the library was in great want of funds; and they presented a petition asking for a declaration that the whole of the 40*l.* a year, the subject of the order of 1742, and so much of the 40*l.* a year bequeathed by the testator as was not required for repairing the galleries, ought, under the special residuary gift in the will, to be applied to the purposes of the library; and that if necessary a scheme might be settled for the future application cy-près of the entire sum of 80*l.* a year.

Everitt, *Q.C.*, and *Blakesley*, for the petitioners. The trust for the repair of the causeway has come to an end. The Cambridgeshire County Council and the Chesterton District Council are now responsible for the repairs, and the testator's fund is not required for the purpose. The 40*l.* is given by the

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will for the repairs "as there shall be occasion," and "as the trustees shall think fit"; it is to be applied to the use of the library "after these things are performed." The 40*l.* settled by the order of 1742 represented the 1000*l.* which had not been spent in the construction of the galleries and the road and was intended to carry out the testator's wishes. When the duty of repairing the road was imposed on the local authorities and the rates, the basis on which the order of 1742 was consented to was altered. At that time there were no other means of repairing the road. Now the 11th section of the Local Government Act, 1888 (51 & 52 Vict. c. 41), says that main roads are to be wholly maintained and repaired by the councils. Therefore this income passes to the University Library under the will; there was an absolute gift to the trustees, so that the gift of residue is not void. *Fisk* v. *Attorney-General* (1); *In re Birkett.* (2) On the other hand, if there is a total failure, the money ought to be applied cy-près for the benefit of the library: *Attorney-General* v. *Ironmongers' Co.* (3) Money given for the benefit of particular parishes ought not to be applied in relief of the county rates: *Attorney-General* v. *Brandreth.* (4)

Ingle Joyce, for the Attorney-General. If the Court is of opinion that the trust has come to an end and that the balance of the 80*l.* a year, after providing for the galleries, ought to be applied cy-près, the Attorney-General will support the view that it ought to be given to the University Library. It is, therefore, unnecessary to discuss the question whether the gift fails altogether or passes under the will to the library.

Brinton, for the Cambridgeshire County Council. The proper proportion of the 80*l.* ought to be paid to the Cambridgeshire County Council. Both the 40*l.* given by the will and the 40*l.* settled by the order of 1742 are valid charitable trusts within the statute of Elizabeth, and they have not come to an end. It is immaterial that payment to the county council will result in slightly reducing the rates. A gift to maintain poor persons does not come to an end if the recipients become chargeable to the parish. It is not suggested that the gift in this will for the

(1) (1867) L. R. 4 Eq. 521.
(2) (1878) 9 Ch. D. 576.
(3) (1840) 1 Cr. & Ph. 208.
(4) (1842) 1 Y. & C. Ch. 200.

benefit of poor children has come to an end because board schools have been established in Cambridge.

If the object of the trust has failed, this income does not go to the library under the residuary bequest; it should be applied cy-près, not for the benefit of other beneficiaries under the will, but for objects as nearly as possible the same as those of the original gift: *Lyons Corporation* v. *Advocate-General of Bengal*. (1) It ought not to be passed over to another charity of an entirely different character: *Wilson* v. *Barnes*. (2)

R. J. Parker, for the Chesterton District Council. Nothing has happened to alter the position of the trust declared by the will and by the scheme sanctioned by the Court in 1742. It is a valid trust, and the councils are cestuis que trust under the will and under the order. District councils are not bound to repair the road in any particular way. The Local Government Act, 1894 (56 & 57 Vict. c. 73), only hands over to them the duties of the surveyors; it does not say that the roads are to be repaired by them and by nobody else; but it contemplates the possibility of other persons being responsible. There is no obligation on the councils to keep the road up to any particular standard of repair, and they will not be able to keep it in as good a condition as it has been hitherto unless they receive the money. Further, these funds ought not to be diverted from the inhabitants of the district and given to a library which is not even open to the public.

H. Wace, for the trustees.

Everitt, Q.C., in reply.

Cur. adv. vult.

Oct. 31. NORTH J. stated the facts, and proceeded:—The point raised by this petition is that the trusts of these two sums of 40*l.* each for the repair of the road have come to an end because it is now vested in two bodies which have to do the repairs. I do not see why the trusts created by the will as to the first 40*l.*, and by the decision of the Court on the settlement of the scheme in 1742 as to the second 40*l.*, have come to an end. They seem to me to be still subsisting. They are

(1) (1876) 1 App. Cas. 91. (2) (1886) 38 Ch. D. 507.

NORTH J. 1899 ATTORNEY-GENERAL v. DAY.

charitable trusts. The fund is devoted to a charitable purpose, namely, the repair of the road, and it seems to me that the persons in whom the road is vested, and who are under the liability to repair it, have the benefit of these trusts which have been created for providing the sums I have mentioned for that purpose. Therefore, the claim of the University that the trusts for the repair of the road have failed, and that the University Library Fund ought to be increased by that amount, is not well founded. The order will be that the Court, being of opinion that the trust declared by the will of the first 40*l.* a year and the trust created by the order of 1742 of the second 40*l.* are still continuing, the petition be dismissed. It is suggested that the costs of the petition should come out of the accumulations; but I do not quite see my way to that for this reason—that the accumulations consist of so much of the two sums of 40*l.* each year as was available for the repair of the road if it could be properly applied; and the result is that the accumulations belong to the councils respectively according to their interests in the road. I do not think that the costs of this petition should be paid out of the funds which belong to these two respondents; but they may be paid out of the capital of the trust funds.

Solicitors: *Cole & Jackson, for Francis, Francis & Collin, Cambridge; The Solicitor to the Treasury; Field, Roscoe & Co., for S. R. Ginn, Cambridge; Sharpe, Parker & Co., for John F. Symonds, Cambridge.*

H. C. R.

CONSOLIDATED EXPLORATION AND FINANCE COMPANY *v.* MUSGRAVE.

NORTH J.
1899
Nov. 2, 3.

[1898 C. 3649.]

Illegal Contract—Bail to produce Prisoner—Indemnity.

An indemnity given to bail, whether by the prisoner bailed or another, is illegal.

THE object of this action was to obtain the retransfer to the plaintiffs (a company in voluntary liquidation) of 1500 1*l.* preference shares in the London Woollen Company, Limited, the second of the two defendants on the record, which had been transferred by the plaintiff company into the name of Christopher George Musgrave, the first defendant on the record. The plaintiffs claimed, inter alia, a declaration that the defendant Musgrave was trustee for them of the shares, and retransfer. The defendant Musgrave pleaded that he was entitled to hold the shares as security for 1500*l.*, estreated bail given to produce a prisoner for criminal prosecution, and certain costs, under an arrangement made between himself and one Ainsworth, acting, as he alleged, on behalf of the plaintiff company.

At the end of the year 1897 criminal proceedings were pending against Ainsworth, one Jordan, and a number of others, in regard to fraud committed in promoting a company called Thomas Edward Brinsmead & Sons, Limited.

The terms on which the defendant Musgrave claimed to hold the shares as security were comprised in the following letter from him to Ainsworth, also dated December 23, 1897 :—

"In consideration of your transferring into my name 1500 shares in the London Woollen Company, Limited, I agree to become surety for you and Mr. Francis Richard Jordan in the sum of 1500*l.* each to appear at the High Court of Justice on the trial of *Regina* v. *Brinsmead and Others* and also to enter into the required recognizances with regard thereto and as to payment of costs.

"And I further agree in the event of my not being called

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upon under the terms of my recognizances to make any payment to retransfer the said shares to you or in the event of my being called upon to provide any sum of money to dispose only of sufficient shares to recoup for me the amount so paid by me it being clearly understood on the other hand that should I be called upon to pay such an amount as the shares in question are not sufficient to realize that you will pay me any such amount over and above the amount realized by the sale of the shares."

At that time an application had been made for a writ of certiorari to remove the indictment from the Central Criminal Court to the Queen's Bench Division of the High Court.

Musgrave gave bail in the stipulated amount for the appearance of Ainsworth and Jordan in the High Court. The application for a writ of certiorari, however, fell through owing to the fact that one of the persons prosecuted absconded. The defendant Musgrave then gave bail for the production of Ainsworth to meet his trial at the Central Criminal Court, in the amount of 1500*l.*, and gave similar bail for the production of Jordan.

Jordan absconded, and bail given for his production was estreated.

The transfer from the plaintiff company to Musgrave was made in pursuance of a resolution of persons purporting to act as the board of directors of the plaintiff company on December 23, 1897, evidenced by a minute in the minute-book of the plaintiff company in the following terms: "The matter of guaranteeing costs *re* Brinsmead was considered, and the Consolidated Contract Corporation having agreed to pay by way of premium 100*l.*, and guaranteeing to indemnify this company against loss, it was resolved " that 1500 shares (London Woollen Preference) be lodged with Mr. C. G. Musgrave on receipt of cheque from the Consolidated Contract Corporation, and a further 1000 London Woollen Preference shares with Mr. J. Pronk."

Haldane, Q.C., and *Kenyon Parker*, for the plaintiffs. Apart from any question of illegality, the contract set up by the

defendant Musgrave cannot hold good against the plaintiffs; the shares were the plaintiffs' and were transferred for a different purpose, and Ainsworth had no authority to enter into the arrangement set up.

Supposing the defendant Musgrave is entitled to impute authority in Ainsworth to deal with the shares as against the plaintiffs, he cannot hold the security; for an indemnity given to bail for a prisoner is illegal and against public policy: *Wilson* v. *Strugnell* (1); *Herman* v. *Jeuchner*. (2)

Hon. E. C. Macnaghten, Q.C., and *Felix Cassel*, for Musgrave. The plaintiffs put it into the power of Ainsworth to enter into the bargain with Musgrave, who cannot be affected with notice of anything not appearing on the face of the transfer; apart, therefore, from the question of illegality, the security is good. There was no illegality. We admit that an indemnity given to bail by a prisoner himself is illegal. That is the extent to which the two cases cited go. There is no case in the books that goes further. The reason for this is given in *Jones* v. *Orchard* (3) and *Cripps* v. *Hartnoll* (4), namely, that the public loses the security of the personal interest the bail has to produce the prisoner; if a third person gives an indemnity, there is still a person other than the prisoner who will suffer loss to the amount of the bail estreated.

[NORTH J. The reason why the indemnity to bail is void is that the bail has no longer the same motive to put in force the extensive powers given him by law to enable him to fulfil his duty to produce the prisoner. Can you produce a single passage even from a text-book to the effect that the rule does not apply when the security is given by a third party?]

The statements of the law in Pollock on Contracts, 6th ed. p. 316, and Leake on Contracts, 3rd ed. p. 626, are not inconsistent with, but rather bear out, our view of the law. In the third place, if the contract is illegal, the plaintiffs cannot take advantage of the illegality: they are in pari delicto.

Stewart-Smith, for the London Woollen Company.

(1) (1881) 7 Q. B. D. 548.
(2) (1885) 15 Q. B. D. 561.
(3) (1855) 16 C. B. 614.
(4) (1863) 4 B. & S. 414.

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1899
CONSOLIDATED EXPLORATION AND FINANCE COMPANY v. MUSGRAVE.

Kenyon Parker, in reply, was stopped on the question of illegality.

NORTH J., after deciding that, apart from the question of illegality, the defendant Musgrave would have had a right to the security he claimed, continued:—The second question is whether the acceptance of security by Musgrave through Ainsworth was an illegal bargain: in my opinion it was. It is said that the circumstances of this case are outside the rule exemplified by *Wilson* v. *Strugnell* (1); *Herman* v. *Jeuchner* (2); that, though those cases shew that an accused person cannot himself give security legally to his bail, the rule does not apply to cases where security is given to bail by a third person. For that proposition I find no authority whatever. It is true that there is no authority addressed particularly to the distinction attempted to be drawn; the exact case does not seem to have arisen; there is no such case in the books.

I asked if a passage in a single text-book could be found expressing an opinion in favour of the distinction raised. I was referred to two text-books. The passages cited from them do not give what I asked for. Both books seem to me correctly to represent the decisions in the two cases I have mentioned. In Pollock on Contracts (6th ed. p. 316) the law is stated thus: "An agreement by an accused person with his bail to indemnify him against liability on his recognizances is illegal, as depriving the public of the security of the bail." Again, Leake (3rd ed. p. 626), in his valuable work on the same subject, puts it in this way: "Any contract or engagement having a tendency, however slight, to affect the administration of public justice would be illegal and void." Among the instances he gives is "an indemnity given by a defendant in a criminal case to his bail, because in effect it deprives the public of the intended security for the conduct of the defendant." What the learned author says corresponds exactly with what the late Master of the Rolls says in *Herman* v. *Jeuchner*. (2) After defining broadly a contract, he says (3):

(1) 7 Q. B. D. 548. (2) 15 Q. B. D. 561.
(3) 15 Q. B. D. 563.

"When the object of either the promise or the consideration is to promote the committal of an illegal act, the contract itself is illegal and cannot be enforced. In the present case the defendant required the plaintiff to deposit 49*l.* for the space of two years, and in consideration of the plaintiff so doing the defendant promised the plaintiff to become a surety for him: the plaintiff on his part undertook to deposit the 49*l.* That is the substance of the contract; is it illegal? To my mind it is illegal, because it takes away the protection which the law affords for securing the good behaviour of the plaintiff. When a man is ordered to find bail, and a surety becomes responsible for him, the surety is bound at his peril to see that his principal obeys the order of the Court: at least, this is the rule in the criminal law; but if money to the amount for which the surety is bound is deposited with him as an indemnity against any loss which he may sustain by reason of his principal's conduct, the surety has no interest in taking care that the condition of the recognizance is performed. Therefore the contract between the plaintiff and the defendant is tainted with illegality."

When Musgrave became bail he had cast upon him duties and given to him corresponding powers to enforce them, which powers no third person who became responsible could have. What these powers are and the reasons for them in criminal cases are stated in Petersdorff on Bail, p. 514, in these words: "It is essential for the security of the bail that the principal should be compelled to appear at the time and place specified in the recognizance. To enable the bail to effectuate this purpose, they are invested with the same unrestricted authority over the person of the defendant, as we have already seen is conferred upon them in civil cases. Indeed, in criminal proceedings, the power possessed by the bail, in obliging the accused to fulfil the terms of the recognizance, should be even more unlimited, as by not rendering him they not only forfeit to the public the penalties imposed by law, but perhaps create, in crimes of a flagrant nature, an impossibility of the ends of justice being accomplished. Hence they may seize his person at any time (as on a Sunday), or at any place, to carry him to a justice to find new sureties, or be committed in their

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discharge, and in surrendering the principal they may command the co-operation of the sheriff, and any of his officers." Therefore, it is essential that the person giving bail should be interested in looking after and, if necessary, exercising the legal powers he has to prevent the accused from disappearing: this is essential for the protection of the public, and anything that tends to prevent or hinder his so doing is illegal. Why is it not equally illegal for the bail to be indemnified by a third person, it being admittedly illegal to be indemnified by the prisoner? The reason of the illegality is the same in each case. It is said that the public still have in the person who gives indemnity the same security of a person whose interest it is to produce the prisoner. That is not so, for he has not the power of the bail. It seems to me, therefore, that the security given by Ainsworth to Musgrave is illegal and void.

Then it is said that the plaintiff company cannot get back the shares. I do not see why. I can understand that if Ainsworth were proceeding against Musgrave there would be a difficulty in his way. But it turns out that the shares do not belong to Ainsworth but to the plaintiff company, who are in no way participators in the illegality. I must declare that the security is illegal and void, and make an order for reconveyance.

Solicitor for plaintiffs: *Ralph Raphael.*
Solicitors for Musgrave: *Ashurst, Morris, Crisp & Co.*
Solicitors for London Woollen Company: *Nash, Field & Co.*

D. P.

SALTON *v.* NEW BEESTON CYCLE COMPANY.

STIRLING J.

1899

Nov. 1, 8.

[1898 S. 724.]

Principal and Agent—Warrant of Authority—Solicitor—Authority to Defend Action in Name of Company—Revocation of Authority—Notice of Revocation—Payment by Defendant's Solicitor of Plaintiff's Costs of Abortive Action—Company—Dissolution pendente lite—Judgment against Dissolved Company—Jurisdiction.

A solicitor had originally authority to defend an action in the name of a company, but his authority was revoked by the dissolution of the company shortly before the trial. The trial of the action was delayed owing partly to the state of the business of the Court and partly to the pleadings being amended. The action was tried on the assumption that the company was in existence, and judgment was given for the plaintiff. Neither the solicitor nor the plaintiff knew till after the trial that the company had been dissolved; but on the day of the trial the solicitor was informed that the company had held its final meeting, and he took no steps to ascertain whether or not it had been dissolved. Upon motion by the plaintiff that the solicitor might be ordered to pay his costs of the action as from the date of the dissolution of the company:—

Held, (1.) (distinguishing *Whiteley Exerciser, Limited* v. *Gamage*, [1898] 2 Ch. 405) that the judgment was invalid against the company for want of jurisdiction; (2.) that the solicitor having originally authority to represent the company was not liable for acting on that authority after it had been revoked by the dissolution of the company until he knew or, by the exercise of due diligence, might have known of the dissolution; (3.) that on the day of the trial the solicitor did not use due diligence in ascertaining whether or not the company had been dissolved, and that he ought to pay the plaintiff's costs of the action after that date as between solicitor and client.

The principle of *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, applies to a solicitor representing a party in an action, and it applies to a revocation of authority by the dissolution of a company as well as by the death of an individual.

THIS was a motion on behalf of the plaintiff that the proceedings in the action might be set aside as from November 12, 1898, and that the solicitors for the defendant company, Messrs. Hughes & Masser, might be ordered to pay to the plaintiff his costs of those proceedings as between solicitor and client. The writ in the action was issued on February 25, 1898, and on March 4 an appearance was entered on behalf of the defendant company. On March 17, 1898, the statement of claim was

STIRLING J. delivered; on April 13 the defence was put in; on April 18 the reply was delivered, and on April 20 the action was set down for trial. On November 18, 1898, the statement of claim was amended, and on December 9 the defence was amended. On February 1, 1899, the defence was re-amended, and on February 14 an order for particulars was made.

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The action was tried on March 16, 1899, and on March 23 judgment was given for the plaintiff against the defendant company for 566*l.* 13*s.* 4*d.* and costs. (1) When the plaintiff came to enforce his judgment it was discovered that the company had been dissolved on November 12, 1898, whereupon notice of the present motion was served.

It appeared that at extraordinary general meetings of the company held on October 14 and November 2, 1897, resolutions were passed for the voluntary winding-up of the company, and a liquidator was appointed and directed to carry into effect two contracts for the sale of the assets of the defendant company to two new companies proposed to be formed. One of these new companies was the Beeston Cycle Company, which took over certain assets and liabilities of the defendant company (including the liability to the plaintiff which was the subject of the present action), and by the agreement for sale that company was authorized to defend in the name of the defendant company all actions brought against it with reference to the liabilities so taken over. On February 26, 1898, the writ in this action was left by the liquidator of the defendant company, or by his direction, with the solicitors of the Beeston Cycle Company with instructions to attend to it. The solicitors thereupon brought the matter before the directors of the Beeston Cycle Company, and, by their instructions, appeared to the writ and defended the action.

It now appeared that on July 25, 1898, the liquidator held a final meeting of the defendant company pursuant to s. 142 of the Companies Act, 1862, and made a return of that meeting to the registrar on August 4, and that the return was registered on August 12. Consequently, by virtue of s. 143 of the Act, the defendant company was on November 12, 1898, dissolved.

(1) See [1899] 1 Ch. 775.

The solicitors had no knowledge of these facts until March 16, 1899, the day of the trial. On that day Mr. Masser was informed that the liquidator had called the final meeting of the defendant company, but he was not informed whether the final return of the meeting had been filed with the registrar, and he took no steps to ascertain whether the company had actually been dissolved or not.

Jenkins, Q.C., and *T. L. Wilkinson*, for the plaintiff. It has been decided that a plaintiff in whose name an action has been brought by a solicitor without authority can apply to the Court and obtain an order against the solicitor for payment of the costs occasioned by the unauthorized use of his name: *Fricker* v. *Van Grutten* (1), and a similar order has been obtained by a defendant whose name has been used without authority in defending an action: *In re Gray*. (2) It has also been decided that a defendant who is injured by the unauthorized use of the plaintiff's name may obtain costs against the solicitor: *Geilinger* v. *Gibbs*. (3) The question here is whether a plaintiff who is injured by the unauthorized use of the defendant's name is entitled to similar relief. This is the converse of *Geilinger* v. *Gibbs* (3), and the same reasoning applies. The authority of the solicitors expired on November 12, when the company ceased to exist, and, inasmuch as the plaintiff has incurred fruitless expense in consequence of these solicitors acting without authority, the Court will order them to pay him the costs of the abortive proceedings as between solicitor and client: *Nurse* v. *Durnford*. (4) The knowledge of the solicitors is immaterial; the question is whether or not they had the authority.

Upjohn, Q.C., and *Younger*, for the solicitors. No case has been made out for making the solicitors pay costs.

First, there is here a valid judgment binding on the company. The solicitors had authority to represent the defendant company when this action was commenced and when it was set down for trial, and the subsequent dissolution of the company

(1) [1896] 2 Ch. 649.
(2) (1891) 65 L. T. 743.
(3) [1897] 1 Ch. 479.
(4) (1879) 13 Ch. D. 764.

STIRLING J. 1899 SALTON v. NEW BEESTON CYCLE COMPANY.

does not affect the jurisdiction of the Court to try the action. The delay in the trial of the action was due to the state of business in the Court, and consequently the maxim "Actus curiae nemini facit injuriam" applies: *Whiteley Exerciser, Limited* v. *Gamage* (1); *In re Crookhaven Mining Co.* (2); and see *Cumber* v. *Wane.* (3) If this action had been tried when it was ready for trial, this question would never have arisen. The cases cited by the plaintiff are distinguishable because in those cases the solicitor had no initial authority, and they proceeded on the principle that the litigation was a nullity: see *Reynolds* v. *Howell.* (4)

Secondly, the solicitors having received authority in the first instance to represent the company, they are under no liability for having acted on that authority after it had expired until they had notice of its expiration: *Smout* v. *Ilbery* (5); and they had no notice of the dissolution of the company till after the trial. The Court has a discretion in the matter, and it will not make an order against a solicitor for payment of costs unless something amounting to professional negligence or professional misconduct is proved against him: *Wade* v. *Keefe.* (6)

[STIRLING J. Is not that inconsistent with the English authorities?]

Geilinger v. *Gibbs* (7), which points the other way, is inconsistent with the decision of the Court of Appeal in *La Compagnie de Mayville* v. *Whitley* (8), and cannot be supported.

[Upon the question of the quantum of costs they referred to *Newbiggin-by-the-Sea Gas Co.* v. *Armstrong* (9) and *Nurse* v. *Durnford.* (10)]

Jenkins, Q.C., in reply. The solicitor must be treated as warranting the continuation of the authority as well as the inception of it. This judgment is a nullity, because at that

(1) [1898] 2 Ch. 405.
(2) (1866) L. R. 3 Eq. 69.
(3) (1718) 1 Sm. L. C. 10th ed. 325.
(4) (1873) L. R. 8 Q. B. 398.
(5) 10 M. & W. 1.
(6) (1888) 22 L. R. Ir. 154.
(7) [1897] 1 Ch. 479.
(8) [1896] 1 Ch. 788, 803.
(9) (1879) 13 Ch. D. 310.
(10) 13 Ch. D. 764.

date there was no company in existence. It cannot be enforced by a winding-up petition or otherwise, for the Court has no jurisdiction to go behind the dissolution, except possibly on the ground of fraud: *In re London and Caledonian Marine Insurance Co.* (1) In *Whiteley Exerciser, Limited* v. *Gamage* (2) judgment had been obtained before the company was dissolved, and the learned judge was dealing with the amount of the costs payable under the judgment. That case may be distinguishable from the present upon that ground. If not distinguishable, it is inconsistent with the decision of the Court of Appeal in *In re London and Caledonian Marine Insurance Co.* (1), and ought not to be followed.

Cur. adv. vult.

Nov. 8. STIRLING J., after stating the facts, and expressing his opinion that the legal advisers of the defendant company, upon being informed that the final meeting of the company had been held, ought to have examined the documents at the office of the Registrar of Joint Stock Companies in order to ascertain whether or not the company had been dissolved, and, further, that the fact of the dissolution, when ascertained, ought to have been mentioned to the judge who tried the action, continued as follows:—

It was not disputed that the solicitors had authority to appear and defend the action down to November 12, 1898, but it was contended that their authority terminated on that day. On the other hand, it was contended, mainly on the authority of *Whiteley Exerciser, Limited* v. *Gamage* (2), that the judgment was perfectly valid. In that case, on August 5, 1897, the plaintiff's action was dismissed with costs. The defendant proceeded to tax his costs, and the taxing master made his certificate. On February 4, 1898, the defendant took out a summons to vary the certificate, but owing to the state of business it did not come on until July 15 following. In the meantime on April 14 the company was dissolved in the same way as in the present case. It was held by North J. that the summons could proceed, and he made an order on it adverse to

(1) (1879) 11 Ch. D. 140. (2) [1898] 2 Ch. 405.

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the company. That decision, as I understand it, rested on the ground that the delay was entirely due to the state of business in the Court, and consequently that the maxim "Actus curiae nemini facit injuriam" applied: see *Cumber* v. *Wane*. (1) In my opinion, however, that reasoning does not apply to the present case, for the simple reason that the delay is not shewn to have been entirely due to the state of business of the Court. The action was no doubt set down for trial on April 20, and would have been ripe for trial so far as the Court was concerned early in May; but long after that it was found necessary to amend the pleadings and even to re-amend the defence. The delay, therefore, was partly attributable to the parties themselves.

It was further contended that the solicitors were not liable, because they had originally authority to defend the action, and had no knowledge that the authority had been revoked by the dissolution of the defendant company. Upon this branch of the law the case of *Smout* v. *Ilbery* (2) is the leading authority. There a man who had been in the habit of dealing with the plaintiff for meat supplied to his house went abroad, leaving his wife and family resident in this country, and died abroad. It was held that the wife was not liable for goods supplied to her after his death, but before information of his death had been received; and that decision was given notwithstanding that there was no remedy against the estate of the deceased. Alderson B., in the course of his judgment, said (3): "Here the agent had in fact full authority originally to contract, and did contract in the name of the principal. There is no ground for saying, that in representing her authority as continuing she did any wrong whatever. There was no mala fides on her part—no want of due diligence in acquiring knowledge of the revocation—no omission to state any fact within her knowledge relating to it, and the revocation itself was by the act of God. The continuance of the life of the principal was, under these circumstances, a fact equally within the knowledge of both contracting parties. If, then, the true principle derivable from the cases is, that there must be some wrong or omission of right

(1) 1 Sm. L. C. 10th ed. 325. (2) 10 M. & W. 1.
(3) 10 M. & W. 10.

on the part of the agent, in order to make him personally liable on a contract made in the name of his principal, it will follow that the agent is not responsible in such a case as the present. And to this conclusion we have come."

This judgment is referred to with approval in Story on Agency, s. 265 a, "upon the ground that the continuance of the life of the principal must be deemed to be a fact equally within the contemplation of both parties, as the basis of the contract; and, consequently, neither is deceived or misled by the other as to the conditions essential to give it validity. In short, each understands that the contract proceeds upon the presumption, that the principal is still living, and capable of being bound by the contract, and that the agent only stipulates for good faith and the existence of an original authority to make the contract." It has now to be considered whether this principle applies to the present case. That was a case of an agent entering into a contract for a principal, but the principle laid down is one of the general law of agency. A solicitor is an agent of a special kind. By entering an appearance on behalf of his client he represents or warrants to the opposite party that he has authority so to do; if it turns out that he has not he is liable. That is well established, and has been decided in many cases. No hardship is thereby thrown on the solicitor, because it is his initial duty, both as regards his client and third parties in entering upon the defence or the prosecution of an action, to obtain from his client a proper retainer. But why should a solicitor warrant anything to the opposite party in the further stages of the action beyond that which is termed by Story "good faith," including the use of due diligence in ascertaining whether anything has happened which may have the effect of terminating his authority? It seems to me that the principle laid down in *Smout* v. *Ilbery* (1) applies to a solicitor appearing for a party in an action and known to the opposite party to be such, and applies just as much to the dissolution of a legal entity as to the death of a living person. In my opinion the solicitors ought not to be held liable for any costs down to March 16, 1899. I think, however, that on

(1) 10 M. & W. 1.

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that day Mr. Masser did not use due diligence to ascertain whether the defendant company was dissolved or not, and that any costs incurred by the plaintiff after that day ought to be borne by the solicitors. There will be no costs of the present application.

Jenkins, Q.C. The costs to be paid by the solicitors will be as between solicitor and client.

STIRLING J. Yes.

Solicitors: *Robert Greening; Sharpe, Parker & Co., for Hughes & Masser, Coventry.*

H. B. H.

ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL.

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Nov. 1, 2,

[1898 A. 1942.]

Local Government—Local Authority—Powers—Land acquired for Particular Purpose — Part not required for that Purpose — Application to another Permanent Purpose—Local Government Board—Jurisdiction—Practice—Parties—Injunction—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 295.

Sect. 175 of the Public Health Act, 1875, enables the Local Government Board to direct a local authority to retain land that by no possibility can ever be required for the original purpose for which it was acquired, but it does not enable the board to direct the land to be applied to any purpose permanently inconsistent with that original purpose.

Attorney-General v. *Teddington Urban Council*, [1898] 1 Ch. 66, followed.

If there is a possibility of the land being eventually required for the original purpose the section is inapplicable.

An order of the board made without jurisdiction is not rendered valid by s. 295.

The residuum of interest remaining in the owner of the lands from which the particular land was severed for the original purpose only, his right of pre-emption under s. 128 of the Lands Clauses Consolidation Act, 1845, and the injury (though not amounting to a nuisance) likely to arise to his adjoining lands, severally entitle him to apply to the Court for an injunction to restrain any unlawful user of the particular land.

WITNESS ACTION.

This was an action by the Attorney-General at and by the relation of the Earl of Jersey, and by the said Earl as co-plaintiff, for an injunction to restrain the defendants from erecting an isolation hospital, or hospital for the reception of patients suffering from infectious diseases, on a piece of land at Hanwell.

This piece of land formed part of a larger piece compulsorily purchased from the relator in 1883 by the defendants' predecessors under the powers of the Public Health Act, 1875, for the purpose of disposing of the sewage of Hanwell.

About two acres of the land originally acquired proving unsuitable for that purpose, owing to the elevation, the defendants applied to the Local Government Board for their

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sanction to appropriate those two acres as a site for an infectious diseases hospital, and, after a local inquiry, the board by an order of April 3, 1897, reciting that the defendants had applied to the board under s. 175 of the Public Health Act, 1875 (1), for a direction that those two acres which formed part of the land acquired for the purpose of sewage disposal, but which were not required for that purpose, should be retained by the defendants as a site for the erection of a hospital for infectious diseases other than small-pox, directed that the two acres should be so retained.

The defendants being about to erect the proposed hospital, the plaintiffs brought this action to restrain them, contending that the defendants had no power to use the land for any permanent purpose other than that for which it was acquired, and that the order of the board was ultra vires. They alleged that the erection and use of the hospital would injure the relator's adjacent property, the proposed site adjoining his land and being close to a part ripe for building purposes. They further alleged that the hospital would be a nuisance; but this point was given up at the trial.

The defendants justified under the order of the board, and denied that the relator's land would be injured.

Renshaw, Q.C., and *Howard Wright*, for the plaintiffs. "Land compulsorily purchased for a purpose specified in the

(1) The Public Health Act, 1875, provides as follows:—

Sect. 175: "Any local authority may for the purposes and subject to the provisions of this Act purchase . . . . any lands . . . .

"Any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired shall (unless the Local Government Board otherwise direct) be sold. . . . ."

Sect. 176 incorporates the Lands Clauses Consolidation Acts, 1845, 1860, and 1869, except s. 127 of the Lands Clauses Consolidation Act, 1845, and contains regulations as to the exercise of the compulsory powers under those Acts. The excepted section is the one that directs superfluous lands to be sold within a certain period, and in default to vest in the adjoining owners.

Sect. 295: "All orders made by the Local Government Board in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer, and shall be published in such manner as the board may direct."

Act cannot be used for a different purpose" : Glen on the Law of Public Health, 12th ed. p. 411; *Attorney-General* v. *Southampton Corporation* (1); *Attorney-General* v. *Sunderland Corporation* (2); or, at all events, it cannot be used for any different purpose of a permanent nature: *Attorney-General* v. *Teddington Urban Council.* (3) In the present case the land not required for sewage ought primâ facie to be sold under s. 175 of the Public Health Act, 1875, there being no time limit as under s. 127 of the Lands Clauses Consolidation Act, 1845. In that case the relator would have a right of pre-emption under s. 128 of the Lands Clauses Consolidation Act, 1845. The defendants could then acquire it for a hospital under s. 131 of the Public Health Act, 1875, or under the Isolation Hospitals Act, 1893 (56 & 57 Vict. c. 68); and the depreciation of value caused to the relator's other land by the apprehension of possible mischief, however unfounded, would then be taken into account in assessing the compensation: *Cowper Essex* v. *Acton Local Board.* (4)

This gives the relator an interest to maintain the present action as a co-plaintiff.

Sect. 175 of the Public Health Act, 1875, enables the Local Government Board to direct the retention of the land, but the section gives them no power to direct a permanent user for another purpose.

Warrington, Q.C., and *Stallard*, for the defendants. Sect. 175 enables the board to direct the retention of the land for any permanent lawful purpose. The words "not required" mean "which will never be required." They do not mean "not at present required," as in that case no application to the board is necessary, the local authority having themselves power to devote the land to any lawful temporary purpose: *Attorney-General* v. *Teddington Urban Council.* (3)

The board must, therefore, find that the land will never be required before they can direct its retention under s. 175. The section cannot mean that the land is to be retained for no purpose whatever. It means that the land is to be sold unless

(1) (1859) 1 Giff. 363.
(2) (1876) 2 Ch. D. 634.
(3) [1898] 1 Ch. 66.
(4) (1889) 14 App. Cas. 153.

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the board direct it to be retained for some other purpose authorized by the Act, and its object was to save the necessity of such a sale and repurchase as the plaintiffs desire. The order of April 3, 1897, is conclusive: Public Health Act, 1875, s. 295.

In *Attorney-General* v. *Southampton Corporation* (1) and *Attorney-General* v. *Sunderland Corporation* (2), the land was held on special trusts, so that any change of user, permanent or temporary, outside those trusts was clearly unlawful.

No reply was called for.

KEKEWICH J. The question in this case is exceedingly simple. The defendants, having compulsorily purchased land of the Earl of Jersey for sewage purposes under the powers of the Public Health Act, 1875, are proposing to use part of the land so acquired for the purpose of an infectious diseases hospital. The land which it is proposed to devote to the hospital lies somewhat higher than the adjoining land, and cannot, according to present sewage science, be conveniently devoted to the disposal of sewage. The principle on which one approaches a case of this kind is that no public body, whether simply entrusted with powers for the benefit of the public or as a railway company entrusted with powers primarily for the benefit of the public, but also for the benefit of the shareholders, debenture-holders, and others, can properly acquire land for the purpose sanctioned, and then devote that land to a purpose not sanctioned. The public body are authorized to buy land for the particular purpose. So far as it is not wanted for that purpose, it is land which in one sense they ought not to hold. Whether they hold it under the Lands Clauses Consolidation Act, 1845, as superfluous land, or under the Public Health Act, 1875, with a direction to sell, is immaterial. It is not their land. They have not got the fee simple free from all charges, incumbrances, and limitations. They hold it only for a certain purpose. The question, therefore, resolves itself into this: Do the defendants hold this particular land for the purpose of applying it as the site of a hospital? If not,

(1) 1 Giff. 363. (2) 2 Ch. D. 634.

they are proposing to use the property for a purpose not authorized, and, on application by proper persons, they must be restrained. The question really depends on s. 175 of the Public Health Act, 1875, which provides for the sale of "any lands acquired by a local authority in pursuance of any powers in this Act contained and not required for the purpose for which they were acquired." The defendants contend that the phrase "not required" does not refer to land not required at any particular moment, but to land that by no possibility can ever be required for the particular purpose. To that I entirely assent. It is not a question whether the land now is or will in time to come be required, but in order to make the section apply it must be ascertained that the land is absolutely not required for the purpose for which it was acquired. It has then to be sold. I am not concerned with the question whether this land ought to be used now or not. That is not part of my inquiry. But I am told there is a fetter on the sale introduced in order to avoid questions like those that have arisen under the 127th section of the Lands Clauses Consolidation Act, 1845, and to give the Local Government Board power to prevent a premature sale, and to direct the land to be retained although it is not required. The words are "shall (unless the Local Government Board otherwise direct) be sold." If the board has directed that it shall not be sold, then for the present purpose no further inquiry can be made, and it will not be sold. But the defendants argue that the section necessarily means that the board may not merely direct the local authority not to sell, but may, at the same time, direct them to apply the land for another purpose. That is introducing words which certainly are not in the statute, and for which there is no necessary implication. The board can merely direct that the land shall not be sold, leaving everything else open. Some further inquiry or provisional order may be necessary; but I see no reason for concluding that because the board have a discretion to say that land not required shall not be sold, they are therefore empowered to say that it shall be applied to any purpose other than that for which it was originally acquired. But then one is met by the board's order of April 3, 1897, and

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it is strange that, though it purports to be made under the provisions of s. 175 of the Public Health Act, 1875, the draftsman of the order did not see fit to follow the words of the Act. The order does not say that the land "shall not be sold"; it does not even say that the land "shall be retained," which might be considered a verbal equivalent to the words "shall not be sold," but it says, "shall be retained by the said council as a site for the erection of a hospital for infectious diseases other than small-pox."

If I am right in my construction of the Act, the board had no jurisdiction to make any such order, thereby purporting to give the local authority power to use the land for a purpose entirely alien to that for which it was acquired. It is pointed out that under s. 295 "All orders made by the Local Government Board in pursuance of this Act shall be binding and conclusive in respect of the matters to which they refer." But that does not prevent the Court from considering the question of jurisdiction. It cannot be intended that an order of the Local Government Board made without jurisdiction is to be held conclusive in a court of justice. It must be the duty of the Court to inquire whether the order could properly be made. If it could properly be made, it would be conclusive under s. 295, though there might be some irregularities about it, and though perhaps it ought not to have been made. But those are matters into which, at any rate for the present purpose, I shall assume the Court ought not to inquire.

The only authority to which I need refer is *Attorney-General* v. *Teddington Urban Council* (1), which shews precisely how the matter is viewed by the Courts. I will assume now that the land need not be sold. The Courts have held in more than one case—and Romer J. held in that case—that a local authority retaining land for a particular purpose are not bound to apply it immediately to that purpose, but must not devote the land so retained to any purpose permanently inconsistent with the purpose for which it was acquired. Some of the other cases, e.g., *Attorney-General* v. *Sunderland Corporation* (2), shew that the purpose declared is construed liberally, so that

(1) [1898] 1 Ch. 66. (2) 2 Ch. D. 634.

a purpose of an ancillary character may be allowed; but Romer J. held, and it seems perfectly clear, that the local authority are not justified in devoting the land acquired for a particular purpose to a purpose not merely alien thereto, but permanently interfering with the devotion of the land to that original purpose. It has not been suggested that building a hospital is not permanently inconsistent with the use of this land for sewage, unless, indeed, the hospital is pulled down and the land cleared.

I only put in that exception lest it be said that there is no such thing as permanency in the ordinary sense of the word. Of course a hospital could not be permanent in that sense; but to erect a hospital would be a permanent interference with the application of the land for the purpose of the disposal of sewage.

The proposition in Glen on the Law of Public Health, 12th ed. p. 411, is perhaps a little wanting in accuracy in stating that "land compulsorily purchased for a purpose specified in the Act cannot be used for a different purpose." It cannot be used for a different purpose which would permanently interfere with its devotion to its original purpose, but the proposition is substantially correct. The result, therefore, is that the defendants are without any order on which they can properly rest, endeavouring to use this land for a purpose for which it was not originally acquired, and that they have no authority to do.

Now as regards the parties, the Attorney-General of course is a proper complainant when the local authority are exceeding their powers. As regards Lord Jersey, the matter requires a little more consideration. He has sold his land for a special purpose. He has not sold it except for that special purpose; and it seems to me there must necessarily be vested in him some residuum of interest—that is to say, whatever is left out of a conveyance of the fee for a special purpose only. He has not conveyed it for all purposes. But, quite apart from that, he is the owner of the surrounding property. Under the 128th section of the Lands Clauses Consolidation Act, 1845, which is incorporated by the Public Health Act, 1875, he has

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certain rights of acquiring this property if eventually it is determined that it will not be required, and no direction to retain it is given by the Local Government Board. That gives him a sufficient interest to maintain the action; but, besides that, there is no doubt that his adjoining land would become less marketable and less valuable by reason of the erection of this hospital. In that respect he has an interest in preventing the authority from devoting the land to a purpose for which he has not sold it; and that is sufficient to make him a proper plaintiff as well as an informant or relator. There must be an injunction to restrain the defendants from what I consider an excess of their statutory powers, and they must pay the costs of the action.

Solicitors: *Freshfields & Williams; Warren S. James.*

G. R. A.

KEKEWICH J. 1899 *Oct.* 28; *Nov.* 3.

In re PAWLEY AND LONDON AND PROVINCIAL BANK.

[1899 P. 1585.]

Vendor and Purchaser—Real Estate—Title—Conveyance—Concurrence of all Executors—Land Transfer Act, 1897 (60 & 61 *Vict. c.* 65), *s.* 1; *s.* 2, *sub-s.* 2; *s.* 24, *sub-s.* 2.

Where a testator dies subsequently to the Land Transfer Act, 1897, having appointed executors, his real estate vests in all the executors, and not only in those who prove the will or act in the administration of the estate; and the executors who have proved the will cannot convey the legal fee simple without the concurrence of their co-executor who has not proved.

ADJOURNED SUMMONS.

Charles Pawley, by his will dated May 31, 1895, devised and bequeathed his real and residuary estate to his sons, Ernest Frederick Pawley and Francis Adolphus Pawley, and his daughter Evelina Pawley, upon certain trusts, and directed his trustees as soon as conveniently might be after his decease, but at their discretion, to sell and dispose of all his real estate. The testator nominated and appointed his said sons E. F. Pawley and F. A.

Pawley and his said daughter Evelina Pawley to be his executors and executrix and trustees of that his will, and directed that, if any of them should be absent from England at the time of his death, he or she should be at liberty to prove the will on his or her return to this country, and that all the powers and trusts thereby given to his trustees might be exercised by such of them as for the time being might have proved his will.

The testator died on July 7, 1898; and on April 5, 1899, probate of his will was granted to Ernest Frederick Pawley and Evelina Pawley, power being reserved to the remaining executor, Francis Adolphus Pawley, to come in and prove.

Francis Adolphus Pawley was permanently engaged in India, and he had not proved the will, nor had he disclaimed the trusts thereof.

On June 7, 1899, Ernest Frederick Pawley and Evelina Pawley entered into a contract with the London and Provincial Bank, Limited, for the sale to the bank of freehold hereditaments forming part of the estate of the testator, and consisting of a messuage known as No. 42, Kirkdale, Sydenham, in the parish of Lewisham.

The purchasers required that Francis Adolphus Pawley should join in the conveyance to them, or that the disclaimer by him of the trusts of the will should be abstracted and produced.

To this requisition the vendors replied that there was no occasion for Francis Adolphus Pawley (who was in India) to be a party, as the vendors proved the will and were selling as executors under the Land Transfer Act, 1897. (1)

(1) The material provisions of the Act are as follows:—

Sect. 1, sub-s. 1: "Where real estate is vested in any person without a right in any other person to take by survivorship it shall, on his death, notwithstanding any testamentary disposition, devolve to and become vested in his personal representatives or representative from time to time as if it were a chattel real vesting in them or him."

Sect. 2, sub-s. 1: "Subject to the powers, rights, duties, and liabilities hereinafter mentioned, the personal representatives of a deceased person shall hold the real estate as trustees for the persons by law beneficially entitled thereto, and those persons shall have the same power of requiring a transfer of real estate as persons beneficially entitled to personal estate have of requiring a transfer of such personal estate."

Sub-s. 2: "All enactments and rules of law relating to the effect of probate

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The purchasers, however, insisted on their requisition, and on July 19, 1899, the vendors took out a summons in the

or letters of administration as respects chattels real, and as respects the dealing with chattels real before probate or administration, and as respects the payment of costs of administration and other matters in relation to the administration of personal estate, and the powers, rights, duties, and liabilities of personal representatives in respect of personal estate, shall apply to real estate so far as the same are applicable, as if that real estate were a chattel real vesting in them or him, save that it shall not be lawful for some or one only of several joint personal representatives, without the authority of the Court, to sell or transfer real estate."

Sect. 3, sub-s. 1: "At any time after the death of the owner of any land, his personal representatives may assent to any devise contained in his will, or may convey the land to any person entitled thereto as heir, devisee, or otherwise, and may make the assent or conveyance, either subject to a charge for the payment of any money which the personal representatives are liable to pay, or without any such charge; and on such assent or conveyance, subject to a charge for all moneys (if any) which the personal representatives are liable to pay, all liabilities of the personal representatives in respect of the land shall cease, except as to any acts done or contracts entered into by them before such assent or conveyance."

Sub-s. 2: "At any time after the expiration of one year from the death of the owner of any land, if his personal representatives have failed on the request of the person entitled to the land to convey the land to that person, the Court may, if it thinks fit, on the application of that person, and after notice to the personal representatives, order that the conveyance be made, or, in the case of registered land, that the person so entitled be registered as proprietor of the land, either solely or jointly with the personal representatives."

Sect. 24, sub-s. 2: "In this Act the expression 'personal representative' means an executor or administrator."

The following rules were also referred to in argument:—

"The General Rules under the Land Transfer Acts 1875 and 1897. Transmissions of Land and Charges.

"(i.) On death.—Rule 128: On production of the probate or letters of administration of a sole (or sole surviving) registered proprietor of land, or of a charge, dying after 1897, the personal representative named in such probate or letters shall be registered as proprietor in the place of the deceased proprietor, with the addition of the words, 'Executor (or Administrator) of deceased,' and if an executrix or administratrix is a married woman, that fact shall be stated."

Rule 129: "When, after one executor has been registered as proprietor under the preceding rule, another executor applies to be registered as proprietor jointly with him, the registrar shall, after notice to the other executors, make the necessary alteration in the register upon production by the executor applying, of the probate obtained by him; or if he has not proved the will, of a statement in writing, signed by him, that he has accepted the executorship and desires to be registered accordingly." See W. N. (1898) Pt. II. p. 289.

matter of the contract and of the Vendor and Purchaser Act, 1874, asking that it might be declared that Ernest Frederick Pawley and Evelina Pawley, as executors and trustees of the will of Charles Pawley, deceased, had power to convey the hereditaments to the purchasers without obtaining either the concurrence of or a disclaimer by Francis Adolphus Pawley, another executor and trustee named in the will, and that the objections of the purchasers had been sufficiently answered and a good title shewn.

This summons was adjourned into court, and now came on for hearing.

P. O. Lawrence, Q.C., and *Percy Wheeler*, for the vendors. We submit that upon the true construction of the Land Transfer Act, 1897, s. 1, sub-s. 1; s. 2; s. 3, sub-s. 1, and the definition clause, s. 24, sub-s. 2 (1), the executors empowered to convey real estate are executors who have acted, and therefore precluded themselves from renouncing, or have proved the will. A person appointed executor cannot be sued until he has intermeddled with the estate or proved the will: *Douglas* v. *Forrest* (2), cited in Williams on Executors, 9th ed. p. 257, and in *Mohamidu Mohideen Hadjiar* v. *Pitchey*. (3)

[KEKEWICH J. The National Debt Act, 1870 (33 & 34 Vict. c. 71), s. 23, contained a provision that executors who had proved the will should be the only necessary parties to a transfer, but I find no corresponding provision in the Land Transfer Act, 1897.]

It was never intended by the Act of 1897 to affect the position of an executor who has not proved the will, and the construction contended for is in harmony with the pre-existing law. So long ago as the statute 21 Hen. 8, c. 4 (see Williams on Executors, 821), the case of an executor refusing to sell was provided for, and it was in effect enacted that in such an event the other executor might sell. And in *Bonifaut* v. *Greenfield* (4) it was held that land devised to several executors

(1) See ante, note (1), p. 59.
(2) (1828) 4 Bing. 686, 704; 29 R. R. 695.
(3) [1894] A. C. 437.
(4) (1587) Cro. Eliz. 80.

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in fee to the intent that they should dispose of it may be sold by any of them if the others refuse to execute the authority. Again, under the Probate Acts, if an executor does not prove, and dies, he is in the same position as if he had never been executor: Court of Probate Act, 1858 (21 & 22 Vict. c. 95), s. 16; Williams on Executors, 226; and if an executor does not prove, and the proving executor dies, the executor of the proving executor is the personal representative of the testator.

[KEKEWICH J. Where is the legal estate?]

In the two executors who have proved. It is vested by the Act in each and all of the executors who prove the will, but one of several who have proved cannot transfer without the others. By s. 1 the real estate is vested in them as if it were a chattel real, and a chattel real is vested in each and all of the executors: Williams on Executors, 785.

The Court is in effect asked to put a construction on s. 24, sub-s. 2, and we submit that the sub-section applies only to executors who prove the will.

Secondly, we submit that it is competent to the two executors to sell and convey under the power contained in the will.

[KEKEWICH J. Under the Act of 1897, when a year from the death of the testator has expired, the devisees in trust are in a position to call for a conveyance, and any difficulty as to an outstanding legal estate in an executor who has not proved could be got over under the Trustee Act, 1893.]

We contend that these two executors, having the entire legal estate in them under the Act, can properly convey under the will to themselves and through themselves to a purchaser; and in the alternative we say that they have power under the will to sell and convey the legal estate.

Warrington, Q.C., and *Pattisson*, for the purchasers. The legal fee simple is, by virtue of the Land Transfer Act, 1897, vested in all the three executors, and it is not competent for two of them to convey without the concurrence of the other. There are two leading principles which govern this case. First, an executor derives his title from the will and not from the probate. Therefore the real estate under the Act vests in the executors at the moment of their testator's death; but the

estate which is so vested in them as personal representatives is, by virtue of the Act, not an ordinary joint estate, but an estate vested in each. Secondly, probate in the case of executors enures for the benefit of all, so that if it is granted to one of two, the other is personal representative before he has himself taken out probate. In *Watkins* v. *Brent* (1), where there was a doubt as to the validity of a probate, the Court granted an injunction to restrain an executor who had not proved from dealing with the estate, but did so on the express ground that the doubt as to the validity took the case out of the ordinary rule against interference with the legal personal representative. In *Brazier* v. *Hudson* (2) it was held that if one executor does an act and dies without proving, the act is valid if the will is afterwards proved. An executor cannot renounce by matter in pais, he must renounce by matter of record, and it cannot, therefore, be taken that because an executor has not acted he has renounced. But for the prohibition contained in s. 2, sub-s. 2, of the Act, this executor who is in India might convey the estate, and according to the authorities his conveyance might be valid. The Act takes the legal estate away from the devisees, and, notwithstanding anything contained in the will, vests it in the executors, and as formerly all the devisees must have joined in conveying the legal estate, so now must the executors. It was because the Act was intended to have this effect that the reference throughout is to "personal representatives." Rules 128 and 129 of the rules under the Act (3) shew that the framers of the rules recognised the fact that an executor who has not proved has the estate in him. We say, therefore, that the only power which at the present time the vendors have is as executors under the Land Transfer Act, 1897. The will is immaterial. Under the will, as under the Act, the concurrence of all the executors is necessary.

Lawrence, Q.C., in reply.

Cur. adv. vult.

Nov. 3. KEKEWICH J. To allow the objection of the purchasers is to give a limited and perhaps a narrow construc-

(1) (1835) 7 Sim. 512. (2) (1836) 8 Sim. 67; 42 R. R. 106.

(3) See ante, note, p. 60.

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1899.

PAWLEY AND LONDON AND PROVINCIAL BANK, *In re.*

tion to those sections of the Land Transfer Act, 1897, which constitute a real representative. Nevertheless it is right to construe an Act of Parliament strictly, and in dealing with real property especially to stand on the old ways. The absence of one of two or more executors, or his inability from illness or other cause to prove the will immediately, is an event of common occurrence, and the difficulties and delays caused thereby are familiar to practitioners. The Act of 1897 might, therefore, have conveniently provided, as was provided by the National Debt Act, 1870, that the executors who had proved the will should be the only necessary parties to a transfer. But the omission thus expressly to provide supports the proposition that by the term "his personal representatives" used in the first and other sections of the Act those filling that character were intended to be described irrespectively of the question whether they had obtained a grant of probate or not. It is common knowledge that an executor derives his title from the will, and not from the grant of probate, and that he can in his representative character do many things, including the transfer of chattels real, notwithstanding that he has not proved the will. According to the first section of the Act, real estate becomes on the death of a testator, and notwithstanding his testamentary disposition, vested in his personal representatives as if it were a chattel real vesting in them, and, having regard to what has just been said, there is, to my mind, insuperable difficulty in holding that it vests only in the executors who have proved to the exclusion of those who have not proved, unless, of course, the latter have, by renunciation or otherwise, made it impossible for them to obtain a grant of probate.

If this view be sound, the proviso to s. 2, sub-s. 2, occasions no difficulty. Indeed, that sub-section is in entire harmony with the others on the above construction. Observe that it repeats the phrase "as if it were a chattel real vesting in them" used in s. 1, and, therefore, of course, treats all the powers of personal representatives over chattels real as applicable without more to freeholds vested in them under the Act. This makes perfectly intelligible the proviso prohibiting the sale by some or one only of several joint personal representatives,

which otherwise would have been possible notwithstanding lack of probate by him or them.

There is no need to examine any subsequent provision of the Act. Reference was also made to rules 128 and 129, about which I will only say that, though apparently framed in accordance with the views already expressed, they cannot, in my opinion, be looked at on the point of construction.

The vendor makes a second point in support of his title. He says that the express direction at the end of the will empowers the proving executors to sell. This in my judgment is so, the words being perfectly plain. But that does not get over the difficulty, the question being whether they can pass the legal estate; and if that be under the Act vested in the three, it cannot, by virtue of the direction, be transferred by two only. I suggested during the argument that this power might be used by the application of the Trustee Act, and, although the suggestion was not further pursued, I do not at present see the answer to it in point of law. On the other hand, it would not be possible to perfect the conveyance by this method without service of process on the non-proving executor in India; and if that be necessary, no time or expense would be saved, and it would be better at once to obtain his execution of the conveyance.

I must, therefore, uphold the purchaser's objection to the title.

[His Lordship accordingly made a declaration on the summons that E. F. Pawley and E. Pawley, as executors and trustees of the will of C. Pawley, had no power to convey the hereditaments to the purchaser without either the concurrence of or a disclaimer by F. A. Pawley, the other executor and trustee.]

Solicitors for vendors: *Sandom, Kersey & Knight.*
Solicitors for purchasers: *Newton, Lewin & Levett.*

C. C. M. D.

KEKEWICH J.

1899

Nov. 4.

ASHBY *v.* WILSON.

[1899 A. 390.]

Lease—Covenant by Lessor not to let adjoining Land for Purposes of a Trade—Lessee not entitled to enforce Covenant as to User between Lessee of adjoining Land and Lessor.

The defendant W., the owner of a row of houses, let No. 3 to H. as a shop for carrying on a specified business. The lessee covenanted to use the premises for that business only, and the lessor covenanted not to let any of the other houses for the purposes of the same business. The plaintiff was the assignee of H.'s lease, continuing the business.

Afterwards W. let No. 1 to the defendant B., taking a covenant from B. to use the premises only for the purposes of another specified business.

The defendant B. sold various articles which, as the Court found, were comprised in the plaintiff's business:—

Held, that W. had broken no covenant of his own, and was not bound to sue B. for the breach of his covenant with W. at the request of the plaintiff, who was neither covenantee nor assignee of B.'s covenant; and the plaintiff, therefore, could sue neither W. nor B.

Kemp v. *Bird*, (1877) 5 Ch. D. 549, 974, followed, notwithstanding *Fitz* v. *Iles*, [1893] 1 Ch. 77.

By an indenture of a lease dated November 27, 1893, the defendant Wilson, who was the owner of houses numbered 1, 2, 3, 4, 5, and 6, The Broadway, Church End, Finchley, demised to H. T. Bigglestone a shop, No. 3 of the houses, for the purposes of the business of a fruiterer, greengrocer, and corn-chandler, for the term of twenty-one years. The lease contained a covenant by the lessee not to carry on or permit to be carried on any noisome trade upon the premises, and to use the same as and for the business of a fruiterer, greengrocer, and corn-chandler only, and a covenant by the lessor that he would not let any of the other five houses for the purposes of the trades of a fruiterer, greengrocer, or corn-chandler.

On August 2, 1898, the lease was assigned by Bigglestone to the plaintiff, and he carried on upon the demised premises the businesses of a fruiterer, greengrocer, and corn-chandler.

On June 29, 1897, Wilson granted a lease of No. 1, The Broadway, to the defendant Bebb for thirty-three years from

November 26, 1896. This lease contained a covenant by Bebb that he would use the premises as and for an oil, colour, and Italian warehouse only.

The plaintiff had, as he alleged, ascertained that the defendant Bebb had recently commenced to sell oranges, lemons, apples, onions, barley, maize, oats, birdseed, and dog-biscuits.

The plaintiff brought this action for an injunction to restrain the defendant Wilson from letting or continuing to let the premises, No. 1, The Broadway, to the defendant Bebb or any other person for the purposes of the trades of a fruiterer, greengrocer, or corn-chandler, or from permitting the premises to be used for the purposes of these trades, in contravention of the covenant contained in the lease to the plaintiff of November 27, 1893. He also asked for an injunction to restrain the defendant Bebb from using the same premises for the purposes of the above-mentioned trades.

It was admitted by Bebb that he had sold all the articles complained of (except apples), but as to barley, maize, and oats, only in small quantities as food for poultry; and he alleged that it was within the scope of an oil, colour, and Italian warehouseman's trade to offer these articles for sale; and that ever since he first took the shop in 1884 (under a former tenancy) he had openly sold the articles complained of.

There was evidence of a conflicting character as to whether the sale of the articles complained of did or did not come within the business of an oil, colour, and Italian warehouse; but there was no evidence of the existence of any general scheme as to building or user affecting the property of Wilson, and the only question calling for a report is whether, assuming that there had been a breach by the defendant Bebb of the covenant by him contained in the lease to him by Wilson of June 29, 1897, it was competent for the plaintiff, by reason of the covenant contained in his lease from Wilson or otherwise, to maintain any action against Bebb.

P. O. Lawrence, Q.C., and *Gerald J. Wheeler*, for the plaintiff. The landlord being a party to this action, and the covenant between the landlord and the defendant Bebb having

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been inserted in the lease to Bebb for the protection of the plaintiff and in pursuance of the landlord's covenant with him, the plaintiff, according to the principle of *Fitz* v. *Iles* (1), is entitled to maintain this action for the enforcement of the covenant by Bebb. It is clear that Bebb has broken his covenant. The sale of the articles complained of, though it may be ancillary to the business of an oil and colour and Italian warehouseman, is in no sense a part of that business, and *Fitz* v. *Iles* (1) is a direct authority to shew that the fact that articles dealt in are ancillary to a larger business does not prevent the sale of them from being a breach of a covenant such as this. So in *Buckle* v. *Fredericks* (2), where the main business was that of a theatre, the selling of wine, spirits, and beer at stalls or counters inside the theatre was held to be a breach of a covenant not to carry on the trade of a retailer of those articles. *Stuart* v. *Diplock* (3) is distinguishable, because in that case the articles sold were not merely ancillary to, but an essential part of the stock of, the business of a hosier carried on by the defendant, although they also formed a part of the necessary stock of the business of a ladies' outfitter which he was prohibited by covenant from carrying on. By reason of the covenant entered into with the plaintiff by the landlord, the plaintiff is entitled to call upon the landlord to sue Bebb for the breach of covenant, and, joining the landlord as a party, he can, to avoid circuity, sue Bebb.

Further, Bebb must have taken his lease with knowledge of the covenant by the landlord contained in the plaintiff's lease, and is therefore liable under the principle of *Tulk* v. *Moxhay*. (4)

R. J. Parker, for the defendant Wilson, submitted that there had been no breach of any covenant on his part, and that the action as against him must fail.

Warrington, Q.C., and *George Cave*, for the defendant Bebb. The plaintiff cannot maintain this action against this defendant. Bebb has entered into a covenant with Wilson, which may or may not have been broken; but the plaintiff is not a covenantee, nor the assign of the covenantee, nor entitled under

(1) [1893] 1 Ch. 77.
(2) (1890) 44 Ch. D. 244.
(3) (1889) 43 Ch. D. 343.
(4) (1848) 2 Ph. 774.

any contract in the nature of a building scheme or otherwise to the benefit of the covenant by Bebb. *Kemp* v. *Bird* (1), a case in which the Court of Appeal affirmed the decision of Fry J., is a conclusive authority against the plaintiff. There, as here, a lessee sued the landlord, who had entered into a covenant with him, and another lessee, who had entered into a covenant with the landlord against setting up an eating-house, seeking to obtain the benefit of the latter covenant, and it was held that, the landlord's covenant not having been broken, the plaintiff had no right of action as against the other lessee. In *Fitz* v. *Iles* (2) the point decided in *Kemp* v. *Bird* (1) was not before the Court, and Lindley L.J. said that the right of the plaintiff to sue the defendants, the lessees, if they were breaking the covenant, was not in controversy. It does not clearly appear from the report why the question was not argued, but it must be taken that for good reasons the objection was waived. The whole argument in the case turned upon the question whether there had been a breach, or, in other words, upon the construction of the covenant, and the question as to the right to sue was not dealt with by the Court.

Lawrence, Q.C., in reply. *Fitz* v. *Iles* (2) and *Kemp* v. *Bird* (1) are in direct conflict as respects the right to relief. They are both decisions of the Court of Appeal, and, where there is a conflict of this kind, the later decision ought to prevail.

KEKEWICH J. The question of fact in this case is whether the defendant Bebb is carrying on the businesses of a fruiterer, greengrocer, or corn-chandler, either one or other of them. By the restrictive covenant contained in his lease, he is bound to carry on the business of an oil, colour, and Italian warehouseman only, and if he is carrying on the business of a fruiterer, greengrocer, or corn-chandler, he is infringing that covenant; and, moreover, beyond that, he is carrying on the business which the plaintiff is at liberty to carry on, and is thereby entering into competition with him, and probably doing him harm. Now, on that question, notwithstanding the conflict of

(1) 5 Ch. D. 549, 974. (2) [1893] 1 Ch. 77.

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evidence, I confess I have no hesitation in holding that the defendant Bebb is carrying on the businesses of a fruiterer, greengrocer, and corn-chandler, all three. It is enough if he is only carrying on one of them. [His Lordship then examined the evidence on the point, and continued :—]

It being, then, ascertained that Bebb has committed a breach of covenant, there arises a difficult and interesting question of law as to whether the plaintiff can sue Bebb for that breach. There is no covenant between the plaintiff and Bebb. There is no evidence to shew that there is any contract between them resting upon a building scheme or anything of that kind. The doctrine of *Tulk* v. *Moxhay* (1) has been referred to, but the question in this case really depends upon the covenants made with the lessor, Wilson. It is clear that the plaintiff cannot sue Bebb directly; but can he sue Bebb through Wilson? He can do so if he is entitled to call upon Wilson to sue Bebb; and in such a case it would be convenient and right for him simply to join Wilson as a party, and thus, by a short cut, sue Bebb through Wilson. It is only fair to notice that Wilson has never been remiss. He has endeavoured to do his duty as lessor. He has not sued Bebb, but he has not made the slightest difficulty about this action, and has been willing to see justice done between his tenants. But, in order to determine whether the plaintiff can compel Wilson to sue, it becomes necessary to consider what the covenant is into which Wilson has entered with the plaintiff. It is contained in the lease of November 27, 1893, of which the plaintiff is the assignee. [His Lordship referred to the terms of the lease, and continued :—] The plaintiff, then, is bound to use the premises as and for the trades of a fruiterer, greengrocer, and corn-chandler only, and, as the consideration for that, Wilson, the lessor, binds himself not, during the continuance of the demise, to let any of the other houses for the purpose of those trades. That covenant has not been broken by Wilson, because in the lease from him to Bebb there is inserted this special covenant that Bebb is to use his premises as and for an oil, colour, and Italian warehouse only. Wilson has, therefore, done his duty;

(1) 2 Ph. 774.

and, that being so, what claim has the plaintiff against him? I can see none at all. What Mr. Lawrence asks me to do is to construe this covenant of Wilson's with the plaintiff so as to mean something quite different from that which the words themselves import. I do not think any words would justify Mr. Lawrence's argument, except such as these: "and that during the continuance of this demise the other houses shall not be used, &c."; and even if these words were in the covenant there might be some difficulty; but I think that nothing less explicit than words such as those would suffice.

I am then asked to say that, although Wilson has not broken his contract with the plaintiff, the plaintiff is entitled to call upon Wilson to sue Bebb. The answer to that is to be found in a few words of Cotton L.J. in *Kemp* v. *Bird*. (1) He says: "I know of no authority for saying that under such circumstances as these"—and for my purpose I think the circumstances here are sufficiently similar—"a landlord is a trustee for his tenant in the sense that he must, at the request of the lessee, enforce a covenant against another lessee." I am asked to say that Wilson is bound to enforce against Bebb the covenant into which Bebb has entered with him because he has himself entered into another covenant with the plaintiff, which covenant he has faithfully observed. It seems to me that to hold that would be to contradict *Kemp* v. *Bird* (2), which negatives the wider construction of Wilson's covenant with the plaintiff, and negatives also, I think, the right of the plaintiff to sue here. But then it is said I am prevented from holding that by the decision in the case of *Fitz* v. *Iles*. (3) Mr. Lawrence says that if the two cases are inconsistent, as they are both decisions of the Court of Appeal, this Court ought to follow the later decision; but I do not think that it is safe to say that what is last is necessarily best. I confess to having great difficulty in saying that this point of law never occurred to the learned counsel and judges in the case of *Fitz* v. *Iles* (3); but I feel that it is possible, because it is obvious from all the reports of the case that the whole contest was devoted to the question of

(1) 5 Ch. D. 978. (2) 5 Ch. D. 549, 974.
(3) [1893] 1 Ch. 77.

KEKEWICH J. 1899 ASHBY v. WILSON.

construction—that is, whether there was an infringement of the covenant—and not the question of the right to sue on the covenant. The present Master of the Rolls in giving judgment seems to put that beyond question. He says that the right of the plaintiff lessee to sue the defendant lessor and lessee if they were breaking the covenant was "not in controversy," that the lessor was a party, and that "there was no difficulty about it."

Whatever inconsistency there is between *Fitz* v. *Iles* (1) and *Kemp* v. *Bird* (2) must be got rid of on some other occasion. *Kemp* v. *Bird* (2) was not cited in *Fitz* v. *Iles* (1), and I think that *Kemp* v. *Bird* (2) is exactly in point here, and is binding upon me. I think, therefore, that the plaintiff's case fails. I do not think the defendant Bebb has been in the right: I think he has been doing wrong; but, on the other hand, as the plaintiff has come here, and the Court is compelled to hold that he has no right to sue, I do not think I ought to deprive Bebb of his costs simply because I think there has been some want of propriety on his part. Wilson, who has done no wrong, must of course have his costs. I therefore give judgment for the defendants with costs.

Solicitors: *Joseph Gibson; Julius & Thomas; Alfred George Dinn.*

(1) [1893] 1 Ch. 77. (2) 5 Ch. D. 549, 974.

BASCHET *v.* LONDON ILLUSTRATED STANDARD COMPANY.

KEKEWICH J.

1899

Nov. 8.

[1899 B. 1769.]

Copyright—International—Fine Arts—Infringement—Principal and Agent—Penalties—Indecency of Work and Infringements — Costs — Fine Arts Copyright Act, 1862 (25 & 26 *Vict. c.* 68), *s.* 6—*International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 2, *sub-s.* 3—*Bern Convention, art.* 2.

The joint effect of s. 2, sub-s. 3, of the International Copyright Act, 1886, and art. 2 of the Bern Convention, is that an author suing in England in respect of an infringement of foreign copyright must prove that he is entitled to protection in the country of origin of the work, but, that right once established, his remedy depends entirely on the English law.

An author whose copyright is infringed in any manner mentioned in s. 6 of the Fine Arts Copyright Act, 1862, is entitled to recover separate penalties against every infringer, whether principal or agent, master or servant, the minimum penalty in every case being a farthing for each copy by him pirated.

Ex parte Beal, (1868) L. R. 3 Q. B. 387, and *Ellis* v. *Marshall & Son*, (1895) 64 L. J. (Q.B.) 757, followed.

Where an action in respect of infringement of copyright fails on the ground of the indecency of the work, and the indecency has been repeated in the infringements, the action will be dismissed without costs.

WITNESS ACTION.

Action against the publishers, printers, and four distributors of the *London Illustrated Standard* for an injunction to restrain the printers from printing, the publishers from causing to be printed, publishing, and causing to be sold, and the distributors from selling and distributing, piratical copies of the plaintiff's copyright pictures and photographs, and for an account and delivery up of copies, damages, penalties, and costs.

The plaintiff was the publisher in Paris of, and the owner of the copyright according to French law in, a series of publications entitled *La* (1) *Panorama*, first published in France, and he was also the owner, according to French law, of the copyright in seven pictures and photographs first published in Paris in *La Panorama*.

(1) *Sic* in the pleadings.

KEKEWICH J.
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BASCHET v. LONDON ILLUSTRATED STANDARD COMPANY.

The plaintiff had complied with all conditions and formalities prescribed by the French law for the protection of his copyright. Copies of the pictures having been printed, published, and circulated in the *London Illustrated Standard* without the consent of the plaintiff, the plaintiff brought this action. The defendants denied the plaintiff's title, pleaded the indecency of the pictures, and the printers and distributors also pleaded ignorance of the copyright. The printers were merely employees of the publishers. An interlocutory injunction was granted by Kekewich J. and affirmed by the Court of Appeal except as to two pictures, which the Court of Appeal considered too indecent to be entitled to copyright in England. On the action coming on for trial, it was admitted that the injunction must be made perpetual, and the only point in contest was as to the penalties, 20,000 copies of each of the five pictures entitled to copyright in England having been printed. The right of the plaintiff to penalties depended on the construction of s. 6 of the Fine Arts Copyright Act, 1862, s. 2, sub-s. 3, of the International Copyright Act, 1886, and art. 2 of the Bern Convention of September 5, 1887, incorporated by an Order in Council of November 28, 1887. (1)

(1) The Fine Arts Copyright Act, 1862, provides as follows:—

Sect. 6: "... If any ... person, not being the proprietor ... of copyright in any painting, drawing, or photograph, shall, without the consent of such proprietor, repeat, copy, colourably imitate, or otherwise multiply for sale, ... or distribution, or cause or procure to be repeated, copied, colourably imitated, or otherwise multiplied for sale, ... or distribution, any such work or the design thereof; or, knowing that any such repetition, copy, or other imitation has been unlawfully made, shall import into any part of the United Kingdom, or sell, publish, ... or distribute, ... any repetition, copy, or imitation of the said work, or of the design thereof, made without such consent as aforesaid, such person for every such offence shall forfeit to the proprietor of the copyright ... a sum not exceeding ten pounds; ..."

The International Copyright Act, 1886, provides:—

Sect. 2: "The following provisions shall apply to an Order in Council under the International Copyright Acts: ...

"(3.) The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such work was first produced."

The Order in Council of November 28, 1887, incorporates the Bern

A suggestion being made that the defendants were not liable to penalties under the English copyright law, unless they were so liable under the French law, the plaintiff called a French advocate, who proved that the defendants, though not liable to any injunction, were liable to penalties under the Penal Code of 1810, which provides as follows :—

Art. 427 : " La peine contre le contrefacteur ou contre l'introducteur sera une amende de 100 francs au moins et de 2000 francs au plus ; et contre le débitant, une amende de 25 francs au moins et de 500 francs au plus.

" La confiscation de l'édition contrefaite sera prononcée tant contre le contrefacteur que contre l'introducteur et le débitant.

" Les planches, moules ou matrices des objets contrefaits seront aussi confisqués."

Warrington, Q.C., and *Scrutton*, for the plaintiff. The plaintiff does not ask for penalties against the distributors, as he cannot prove they knew the copies were unlawfully made. As against the publishers and printers this is unnecessary : Fine Arts Copyright Act, 1862, s. 6. They are both liable as principals, though the printers were in fact employed by the publishers. There is a separate penalty on every copy : *Ex parte Beal* (1) ; and in England the minimum penalty is a farthing a copy, that being the smallest English coin : *Ellis* v. *Marshall & Son.* (2) In that case the penalties were assessed at

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Convention in a schedule, and provides—

" (2.) This order shall extend to . . . . France. . . .

" (3.) . . . . The author of a literary or artistic work shall not have any greater right or longer term of copyright therein, than that which he enjoys in the country in which the work is first produced."

" (8.) This order shall be construed as if it formed part of the International Copyright Act, 1886."

The Bern Convention provides :—

Art. 2 : " Authors of any of the countries of the Union . . . . shall enjoy in the other countries for their works . . . . the rights which the respective laws . . . . grant to natives.

" The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin.

" The country of origin of the work is that in which the work is first published. . . ."

(1) L. R. 3 Q. B. 387.

(2) 64 L. J. (Q.B.) 757.

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26*l.* 0*s.* 10*d.*, and it appears from Scrutton on Copyright, 3rd ed. p. 187, that there were 25,000 pirated copies. As to this plaintiff's right to recover any penalties at all, the evidence shews that the defendants are liable to penalties under the French law; but, quite apart from that, they are liable to penalties here. The International Copyright Act, 1886, s. 2, sub-s. 3, and the Bern Convention, art. 2, refer to the right, not the remedy. So long as the plaintiff has copyright in the country of origin he is entitled to any remedies open to him in the forum in which he sues. Otherwise, as the evidence shews, he could not obtain an injunction. For the same reason, the penalties must be assessed on the English and not on the French scale.

Renshaw, Q.C., and *Harold S. Simmons*, for the publishers, printers, and three distributors. Having regard to the evidence, it is admitted that the publishers are liable to penalties. The printers, being only their innocent agents, are not liable. The clear distinction drawn by s. 6 of the Fine Arts Copyright Act, 1862, between the alternative classes of those who "repeat, copy, &c.," and those who "cause or procure to be repeated, copied, &c.," implies that principals and agents are not both liable to penalties for the same offence. The section cannot have been intended to give an author two or more sets of penalties for one offence. The penalties must be assessed on the French scale, i.e., one penalty for the entire series of pirated copies.

MacSwinney, for the fourth distributor, who had submitted to judgment on agreed terms.

Warrington, Q.C., in reply.

KEKEWICH J. The manner in which the case has been dealt with in the Court of Appeal on the application for an interlocutory injunction leaves only isolated points for my decision. It is admitted that the interlocutory injunction must be made perpetual as to the five pictures entitled to protection in this Court.

The main question is as to the penalties. The plaintiff admits that he cannot sue the distributors, because they do not come within the first branch of s. 6 of the Fine Arts Copyright Act,

1862, but within the second branch, which is prefaced by the words, "knowing that any such repetition, copy, or other imitation has been unlawfully made," and as the plaintiff cannot prove knowledge against them, he cannot sue them for penalties under that section. He contends, however, that he can sue the publishers and the printers, and, subject to the question of law to which I will refer presently, it is not denied that the publishers are liable to him for penalties. But it is denied that the printers are so liable. It is urged that, being only employed by the publishers, and printing for them because they do not do their own printing, they are not liable under the section. But the words of the section will not bear that construction. It imposes a penalty on any person who, not being the proprietor for the time being of copyright in any painting, &c., "shall without the consent of such proprietor repeat, copy, &c., or cause or procure to be repeated, copied, &c., any such work or the design thereof." The printers have repeated, copied, &c., and fall exactly within the words of the section. It is argued, however, that the section points to two alternative classes of persons, namely, those who "repeat, copy, &c.," and those who "cause or procure to be repeated, copied, &c.," and that the publishers fall within the latter alternative. They would be liable if they printed themselves, and the section makes them liable for causing others to print. It is contended that the employees cannot be liable as well as their employers for the same offence. But I ought not to struggle to get out of the words of the section. The Legislature makes no distinction in this branch of the section between those who know and those who are ignorant that they are doing wrong, and the printers, being within the words of the section, cannot escape on the plea of innocent agency.

I now come to the question of law to which I referred. It arises under s. 2, sub-s. 3, of the International Copyright Act, 1886, which provides that, "The International Copyright Acts and an order made thereunder shall not confer on any person any greater right or longer term of copyright in any work than that enjoyed in the foreign country in which such

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work was first produced." That is agreeable to the Bern Convention of 1887, which provides that "The enjoyment of these rights is subject to the accomplishment of the conditions and formalities prescribed by law in the country of origin of the work, and cannot exceed in the other countries the term of protection accorded in the said country of origin": Scrutton on Copyright, 3rd ed. p. 286. As I understand it, the principle is shortly this: A man cannot sue here in respect of a work published in the country of origin—in this case France—unless he proves that he is entitled to protection in that country of origin; and, vice versâ, a man cannot sue in France in respect of a work published in England unless he proves to the satisfaction of the French Court that he is entitled to sue in England as the country of origin.

But it is a very large step beyond that to say that, the right to sue once admitted, the plaintiff is to have no other remedies in the country in which he sues than he would have in the country of origin. Can it be contended that, sitting here as an English judge, I am only to apply the remedies of the French Court, and, vice versâ, that the French Court can only grant English remedies, however out of place and inapplicable in that jurisdiction?

The remedy by injunction, the first remedy that an English plaintiff seeks, is unknown in France—an excellent example of the impracticability of that construction. As I read the section, "any greater right" means any greater right of protection or of copyright, and the specific provision against a longer term being conferred by the Acts shews that no other limitation was intended. In other words, a copyright owner is only entitled to protection for the term which the country of origin gives him; but everything else is left open. I cannot believe that the Court has to consider the remedies of another country. It would be impossible to work two systems of jurisprudence together in that way. I therefore hold that the plaintiff is entitled to penalties. Then comes the question what penalties I ought to award. Having regard to the large number of copies printed, I think I ought to limit the penalty

per copy as far as possible, and, following the example of Charles J. in *Ellis* v. *Marshall & Son* (1), I take a farthing a copy, that being the smallest coin of the realm. This will bring the penalties against the publishers and printers to about 100*l.* in each case.

The damages are really nominal. In the case of the publishers and printers I think the penalties are sufficient, and I award no damages against them; as against the distributors, I award 5*l.* in each case.

I have now to deal with the costs. The defendants, including the distributors, who must be taken as innocent infringers, have all denied the plaintiff's title to copyright, and defendants, though innocent, who seek to justify a wrong action must pay costs. As regards two out of the seven pictures, the plaintiff has failed on the ground of indecency, but the defendants are in pari delicto in that respect, and, as regards those two pictures, I follow the guidance of the Court of Appeal in such cases as *Newman* v. *Pinto* (2), and dismiss the action without costs. As regards the other five, the plaintiff has succeeded, and is entitled to costs.

The result is that the publishers, printers, and three distributors must pay five-sevenths of the costs. There will be judgment against the other distributor on the terms agreed. (3)

Solicitors: *McKenna & Co.; Braham Barnett; Seagrove & Woods.*

(1) 64 L. J. (Q.B.) 757.
(2) (1887) 57 L. T. 31.
(3) As to the minimum penalty, compare the decision of the Irish Court of Appeal in *Green* v. *Irish Independent Co.*, [1899] 1 I. R. 386.

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KEKEWICH J.

1899

Nov. 16, 22.

THIERY *v.* CHALMERS, GUTHRIE & CO.

[1899 T. 327.]

Lunatic—Foreign Domicil—Foreign Court—Declaration of Lunacy—Tuteur of Estate—Money in English Bank—Payment to Tuteur.

Where there has been a foreign judicial declaration of the status of lunacy of a lunatic resident and domiciled abroad, and the tuteur of the estate appointed in pursuance of that declaration is entitled under the foreign law to take possession thereof, and to give valid discharges for all moneys, stocks, funds, and securities forming part thereof, an application by the lunatic and the tuteur for the transfer or payment of the lunatic's English property to the tuteur may be and generally ought to be granted, and that, whether the property is a trust fund under the control of the Court, or is merely a debt due to the estate.

In re Brown, [1895] 2 Ch. 666, and *In re De Linden*, [1897] 1 Ch. 453, followed.

Didisheim v. *London and Westminster Bank*, W. N. (1899) 107; 43 Sol. J. 642; 81 L. T. 108, distinguished.

Semble, the tuteur may apply in his own name without joining the lunatic.

Further Consideration.

This was the further consideration of an action brought by G. T. Thiery, a person of unsound mind not so found, by E. W. W. Davey his next friend, and by Joseph Jean Edouard Le Juge de Segrais, his tuteur or guardian, as co-plaintiff, to recover certain money and bearer securities held by the defendants as the lunatic's bankers. An account having been taken, and the balance certified, the defendants were willing to pay the money and hand over the securities on receiving a proper discharge, and the only question was whether the tuteur could give that discharge.

The plaintiff Thiery, being resident and domiciled in France, was declared an "interdit" (lunatic) and incapable of managing himself or his affairs by a judgment of the first division of the Civil Tribunal of the Department of the Seine, sitting at the Palais de Justice, the judgment further directing that a meeting of the family council of the lunatic should be held for the

purpose of appointing a tuteur or guardian of his estate. In pursuance of the judgment the family council, sitting under the presidency of the justice of the peace of the eighth division of the city of Paris, duly appointed the plaintiff Segrais tuteur or guardian of the estate.

A French advocate gave evidence that by virtue of this appointment the whole estate of the lunatic was according to French law vested (sic) in the tuteur, and that he was entitled to take possession of every part of it wheresoever and whatsoever, to maintain actions on behalf thereof, and in every respect to represent the same in the most complete manner, and to give good and valid discharges in respect of all moneys, stocks, funds, and securities paid or transferred to him forming part thereof.

He distinguished *Didisheim* v. *London and Westminster Bank* (1), a case on the Belgian law of lunacy, which is practically identical with the French law, on the ground that in that case there had been no judgment declaring Madame Goldschmidt "interdite" or affecting her status, but merely the appointment of an administrateur provisoire, whose duties were only temporary and confined to taking necessary steps for preserving the estate, but who had no power to deal with the estate, which was not vested in him in any way; whereas the proceedings in the present case having been by interdiction and guardianship, the status and civil rights of the lunatic had been affected by the judgment, and the tuteur was in an entirely different position from the administrateur provisoire.

No evidence as to the lunatic's means was given.

Rolt, for the plaintiffs. This case is the converse of *Didisheim* v. *London and Westminster Bank*. (1) There has been a judicial declaration of lunacy affecting the status of the lunatic, and the appointment of a tuteur in whom all his property is equitably vested. The tuteur can sue and give receipts in England for the personal property of the lunatic: Westlake on Private International Law, 3rd ed. p. 49.

In an action by a lunatic creditor and his tuteur against a

(1) W. N. (1899) 107; 43 Sol. J. 642; 81 L. T. 108.

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debtor the Court has no discretion to refuse the order when once the debt is proved: *Scott* v. *Bentley*. (1) This discretionary power is limited to cases "where the property is in the custody of the Court, or can only be reached by an order to be made by the Court under its jurisdiction as to trust property, or under the statutory jurisdiction as to property vested in lunatics": Westlake on Private International Law, 3rd ed. p. 50.

Christopher James, for the defendants. The debt is admitted, and will be paid as the Court directs, the defendants merely desiring a proper discharge. The Court having no control over the money, the only question is one of fact, namely, whether the tuteur can give a discharge.

Cur. adv. vult.

Nov. 22. KEKEWICH J. The defendants are prepared to pay the balance and hand over the securities; but they, of course, require a legal discharge, and the question is whether the tuteur is competent to give them that discharge. I reserved judgment on that question in order to look more carefully into some authorities. Passing over for the moment *Scott* v. *Bentley* (1), those authorities are: *In re Barlow's Will* (2), *In re Brown* (3), *In re De Linden* (4), and *Didisheim* v. *London and Westminster Bank*. (5) After carefully considering them, I think that there may be extracted a general rule that where there has been a judicial declaration of the status of lunacy, and the applicant on the lunatic's behalf has the latter's property vested in him in the sense mentioned by the present Master of the Rolls in *In re Brown* (3), namely, that he has the right to retain and deal with without becoming the actual legal owner of the lunatic's property, the application for the transfer or payment of that property may be and generally ought to be granted. In the most recent case, *Didisheim* v. *London and Westminster Bank* (5), I understand that North J. refused the order because the case did not fall within that rule;

(1) (1855) 1 K. & J. 281.
(2) (1887) 36 Ch. D. 287.
(3) [1895] 2 Ch. 666.
(4) [1897] 1 Ch. 453.
(5) W. N. (1899) 107; 43 Sol. J. 642; 81 L. T. 108.

while on the other hand the order was made by Stirling J. in *In re De Linden* (1) because the rule was applicable. In the present case I have sufficient evidence—namely, the affidavit of a French advocate, to which are exhibited divers French proceedings proving that the lunatic is domiciled in France, and has been declared a lunatic by a competent tribunal, and that the tuteur is entitled, according to French law—to take possession of the lunatic's property whatsoever and wheresoever, maintain actions on behalf of his estate, and give valid and good discharges in respect of all moneys, stocks, funds, and securities paid to or transferred to him forming part of the estate. That seems to me to bring the case clearly within the rule above stated. Under these circumstances no difficulty arises from the fact that the lunatic is described, and properly described, as a person of unsound mind not so found, and, therefore, sues by his next friend, and I ought to make the order asked in favour of the co-plaintiff, who is entitled according to the evidence to represent him for this purpose. In truth, although the action is properly framed as it stands, the tuteur might have sued in his own name and alleged that the defendants were directly responsible to him. This does not touch the entirely different class of cases considered by me in *In re Chatard's Settlement* (2), and I do not consider my present decision in the least inconsistent with my decision in that case. On the other hand, I am not, as at present advised, disposed to give much weight to the distinction urged in argument between cases where the claim is by a creditor against a debtor and those where the Court is in possession of a trust fund. I see no reason why the rule should not be applied as much to one class of cases as to the other. The plaintiffs relied on *Scott* v. *Bentley*. (3) But that case was distinguished by the present Master of the Rolls in *In re Brown* (4); and in *Didisheim* v. *London and Westminster Bank* (5) North J. said it was based on a misconception of the decision of the House of Lords in *Morrison's Case* (*Bayne* v.

(1) [1897] 1 Ch. 453.
(2) [1899] 1 Ch. 712.
(3) 1 K. & J. 281.
(4) [1895] 2 Ch. 666.
(5) W. N. (1899) 107; 43 Sol. J. 642; 81 L. T. 108.

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Earl of Sutherland). (1) It may justify, and certainly is not adverse to, my conclusion here, which, however, is based on the later authorities above mentioned.

Solicitors: *Flux, Thompson & Flux; Clarke, Rawlins & Co.*

G. R. A.

KEKEWICH J. 1899 *Nov.* 29, 30.

In re WEST. GEORGE *v.* GROSE.

[1896 W. 933.]

Will—Construction—Gift in Trust—Surplus—Beneficial Gift or resulting Trust.

A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to the performance of a particular purpose, gives the donee a beneficial interest subject to that purpose.

Gift by will to donees upon trust for sale and upon trust out of the moneys to arise from such sale to pay funeral and testamentary expenses, debts, and legacies, with clauses for indemnity and reimbursement of the "said trustees." No other trusts were declared, and there was no residuary gift. The property not being exhausted by the above trusts:—

Held, that the donees did not take the surplus beneficially, but that there was a resulting trust.

The principles stated in *Croome* v. *Croome*, W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814, and *Williams* v. *Roberts*, (1857) 27 L. J. (Ch.) 177; 4 Jur. (N.S.) 18, discussed and applied.

FURTHER CONSIDERATION.

This was the further consideration of an action for the administration of the trusts of the will of Elizabeth Ann West.

By her will, dated February 15, 1887, the testatrix gave, devised, and bequeathed unto W. R. Grose, J. George, R. Pengelly, and R. G. Pollard all her moneys and securities for money, plate, linen, china, household goods and furniture, and also her freehold property, consisting of her farms therein named, upon trust that, as soon as conveniently might be after

(1) (1749–50) 1 Craigie, St. & P. 454; Mor. Dict. 4595; Dom. Proc. Feb. 1749–50 (Linc. Inn Coll. vol. xv. p. 359).

her decease, they sell the same either together or in parcels, and either by public sale or private contract, with full power to buy in and to rescind any contract for sale, and to resell without being responsible for any loss occasioned thereby, and to do and execute all such acts and assurances for effectuating any such sale as they should think fit. And the testatrix declared that the said W. R. Grose, J. George, R. Pengelly, and R. G. Pollard should, out of the moneys to arise from any such sale, pay her funeral and testamentary expenses and debts, and then certain legacies therein specified. And the testatrix gave, devised, and bequeathed unto A. Grose the dwelling-house in which she then resided. And the testatrix declared that her said trustees for the time being of that her will should be chargeable only with such moneys as they respectively should actually receive, and should not be answerable for any moneys they might not receive. And that the trustees might reimburse themselves out of the moneys that should come to their hands under the trusts aforesaid all expenses to be incurred in or about the aforesaid trusts. And the testatrix appointed the said W. R. Grose, J. George, R. Pengelly, and R. G. Pollard executors of that her will.

The testatrix died on February 28, 1896, and her will was proved by the executors other than J. George, who had predeceased her.

The property not being exhausted by the execution of the above trusts, the question arose whether the donees in trust took the surplus beneficially, or whether there were resulting trusts for the co-heirs-at-law and next of kin of the testatrix.

Warrington, Q.C., and *Cozens-Hardy*, for the donees in trust. The question is whether the words create a gift for a particular purpose only, or a gift subject to the performance of a particular purpose. In the former case there is a resulting trust; in the latter the donees take any surplus beneficially: *Croome* v. *Croome* (1); *Williams* v. *Roberts*. (2)

(1) W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814.

(2) 27 L. J. (Ch.) 177; 4 Jur. (N.S.) 18.

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In the present case there is a general gift, subject only to the performance of particular trusts. This gift cannot be cut down by the insertion of unnecessary clauses such as the indemnity and reimbursement clauses, or the trust for sale, which is mere machinery: *Pratt* v. *Sladden.* (1) The donees, therefore, take beneficially subject only to the trusts declared: *Croome* v. *Croome.* (2)

J. G. Wood, for two co-heirs. At the time *Pratt* v. *Sladden* (1) was decided there was a presumption in favour of the executor, which was reversed by the Executors Act, 1830 (11 Geo. 4 & 1 Will. 4, c. 40). In *Croome* v. *Croome* (2) the Court of Appeal merely restated the principles laid down in *King* v. *Denison* (3), and applied them to the particular will before them, the words "on trust *nevertheless* to pay *thereout*" clearly shewing no general trust was intended. The payment in that case was to be made out of the property directly it came to hand. In the present case it is to be made out of the proceeds of sale. The trust for sale is not mere machinery, but part of the scheme of the will, and both that trust and the indemnity and reimbursement clauses are inconsistent with an absolute gift. A beneficial devise in fee charged with debts or legacies was excepted from the operation of the Law of Property Amendment Act, 1859 (Lord St. Leonards' Act), (22 & 23 Vict c. 35), ss. 14, 18, because the powers of sale given by that Act were unnecessary in such a case.

W. T. Lawrance and *H. C. Davenport*, for two of the next of kin. "Where the property is devised in trust to be sold, the point is so clear against the trustees, that a claim by them is seldom advanced": Jarman on Wills, 5th ed. p. 530. The presumption is now against the executor: *Travers* v. *Travers.* (4)

Edward Symons, *Mark Romer*, and *E. W. Stock*, for other persons interested.

Warrington, *Q.C.*, in reply. The question is one of intention,

(1) (1807) 14 Ves. 193, 200.
(2) W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814.
(3) (1813) 1 V. & B. 260; 12 R. R. 227.
(4) (1872) L. R. 14 Eq. 275.

and is unaffected by the Executors Act, 1830: *Williams* v. *Arkle*. (1)

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KEKEWICH J. A difficult question arises in this case. The testatrix has given her real and personal property to certain persons as trustees, but the trusts declared do not exhaust the property. The question is what is to be done with the part not required to satisfy the trusts. It is impossible to say that because property is given to persons as trustees they therefore take no beneficial interest. That is contrary to all experience of the construction of wills, there being many instances of trustees taking beneficially. Nevertheless, there is a presumption that a gift in trust is not a beneficial gift. It is, however, not uncommon to find a gift of a fund charged with certain payments, or coupled with a condition that a certain amount be paid to a third person. Whether the charge takes effect by way of trust or condition, it is not intended to do more than give a certain amount out of the fund to another person. There are numerous cases of that kind.

In *Croome* v. *Croome* (2) the Court of Appeal, besides applying the rule in *King* v. *Denison* (3) to the will before them, took the opportunity of laying down a rule in their own language.

Cotton L.J. says (4): "I think Mr. Theobald has stated the correct rule to be applied in this case, which is, whether this is a devise for a particular purpose—by which I mean for that particular purpose only—or whether it is a devise subject to certain purposes described as trusts or charges. That, I think, is the rule laid down by Lord Eldon in *King* v. *Denison*. (3) What he says is this: 'If I give to A. and his heirs all my real estate, charged with my debts, that is a devise to him for a particular purpose, but not for that purpose only. If the devise is upon trust to pay my debts, that is a devise for a particular purpose, and nothing more'—that is to say, exclusively for that purpose—'and the effect of those two modes admits just this difference. The former is a devise of an estate of

(1) (1875) L. R. 7 H. L. 606.
(2) W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814.
(3) 1 V. & B. 260; 12 R. R. 227.
(4) 59 L. T. 584, 585.

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inheritance for the purpose of giving the devisee the beneficial interest subject to a particular purpose; the latter is a devise for a particular purpose, with no intention to give him any beneficial interest. Where, therefore, the whole legal interest is given for the purpose of satisfying trusts expressed, and those trusts do not in their execution exhaust the whole, so much of the beneficial interest as is not exhausted belongs to the heir.' He means where it is given for the particular purpose only; but where it is given subject to a particular purpose, then what is not required for the purpose of fulfilling that purpose remains to the devisee, it not being imposed on him as a trust or as a charge. It is very true that the charges created by the words of this will do extend till they are satisfied, and charge the whole of the estate, but that, to my mind, is not the question. Now, in construing, we have to see what is the effect of the words—whether they create a devise for a particular purpose only, or a devise subject to the performance of a particular purpose. I think it is the latter."

Bowen L.J. says: "The principle of law seems to me to be laid down by Lord Eldon in what is really classical language, as regards this branch of construction, in *King* v. *Denison* (1); and it seems to me that all the cases which have been cited by Mr. Graham Hastings, although, of course, one listens to them with interest and advantage, are only illustrations of the application of what is the undisputed principle. With regard to the language of Lord Cairns in the case of *Williams* v. *Arkle* (2), I do not think Lord Cairns can have meant to lay down any different principle from that which was laid down by Lord Eldon. If there is any distinction in his language which would seem to sanction any other principle or to crystallise the result of the authorities into something different from that which is to be found in *King* v. *Denison* (1), I cannot help thinking that it is due either to some imperfection of the report, or to some most unusual departure by Lord Cairns from his almost invariable lucidity of expression."

And Fry L.J. says: "There is no controversy as to the principle we are to apply. That principle has been well ex-

(1) 1 V. & B. 260; 12 R. R. 227. (2) L. R. 7 H. L. 606.

pressed by Lord Eldon in the passage Cotton L.J. has read from the report of *King* v. *Denison* (1), and the inquiry, therefore, before us is this: Has the testator given the whole legal interest for the purpose of satisfying the trusts he has expressed, or has he not?"

The rule, which is quite intelligible, is also well expressed by Stuart V.C. in *Williams* v. *Roberts* (2), the judgment in the *Law Journal* giving the pith of the rule, though it is stated at greater length in the *Jurist*. He says: "The question is, whether the testator has, by his will, made his widow a trustee of the whole or of part only of his personal estate. The language of the will cannot, I think, be construed in any other way than as making her a trustee of that portion of the property only which is given to the legatees other than herself."

That is the pith and marrow of the whole matter. Are the donees in trust trustees in respect of the whole property given, or only in respect of the part that is given to others?

I have now to apply that test to the particular will. There is a general devise and bequest to certain persons on trust for sale. Those words alone do not settle the question, as I might still find the trustees were intended to take beneficially. The trust for sale is in the ordinary form, and the donees contend that it is mere machinery. But the gift differs considerably from that in *Croome* v. *Croome* (3), which was in effect a gift subject to a charge. In the present case the trust for sale is quite unnecessary, if the property belongs to the donees beneficially. In that case they could sell as beneficial owners, though whether the purchaser would require the concurrence of their cestuis que trust is another matter. They need not sell in that way as they have a trust for sale. But I cannot look on that trust as mere machinery. It affords a strong indication that they are to hold the proceeds as trustees generally. A somewhat finer point arises on the direction that the trustees shall be chargeable only with such moneys as they actually receive. That clause is unnecessary, unless the testatrix

(1) 1 V. & B. 260; 12 R. R. 227.
(2) 27 L. J. (Ch.) 177, 178; 4 Jur. (N.S.) 18.
(3) W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T 814.

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contemplated that the donees were trustees of the whole property given. Then follows the reimbursement clause, shewing that the testatrix contemplated that the trustees might require reimbursement of moneys expended in the execution of their trust. The trust for sale and the indemnity and reimbursement clauses hang together, and shew that the testatrix was contemplating a complete trust. This excludes the notion of the trustees taking beneficially, and on the whole I do not think the language of this particular will brings it within the second branch of the rule in *Croome* v. *Croome*. (1)

Solicitors: *Robbins, Billing & Co., for Symons & Gameson, Wadebridge; Lyell & Co., for Mark Guy, Bodmin; W. A. S. Hellyar & Co.; Coode, Kingdon & Cotton.*

G. R. A.

KEKEWICH J.
1899
Nov. 30.

In re NEWELL AND NEVILL'S CONTRACT.

[1899 N. 1636.]

Settled Land Acts—Tenant for Life—Lease of Surface reserving Minerals—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6–13, 17, 20.

The Settled Land Act, 1882, does not enable a tenant for life to lease the surface, reserving the minerals.

VENDOR AND PURCHASER SUMMONS.

This was a purchaser's summons raising the question whether the lease which the vendor had contracted to assign was a valid lease.

The property in lease formed part of a settled estate. On August 8, 1883, North J. made an order under the Settled Land Act, 1882, authorizing the tenant for life generally to make from time to time building leases of the estate, or any part or parts thereof other than the principal mansion-house thereon, for the term of 999 years, on the conditions specified in the said Act, any fine received to be treated as capital money

(1) W. N. (1888) 37, 152; W. N. (1889) 156; 59 L. T. 582; 61 L. T. 814.

and to be paid to the trustees of the settlement. In pursuance of this authority, the tenant for life on April 8, 1887, granted the vendor a building lease for 999 years, "except and always reserved out of that demise unto the tenant for life and his assigns and other the person or persons for the time being entitled to the said premises in reversion expectant on the determination of the term thereby granted all mines, quarries and royalties whatsoever with full and free liberty of ingress, egress, and regress for the having, taking, carrying away and enjoying the same."

The lease contained no provision for compensation for any damage done in exercise of the rights reserved.

The purchaser objected that the lease was invalid on the ground of the above reservation.

Micklem, for the purchaser. The Confirmation of Sales Act, 1862 (25 & 26 Vict. c. 108), does not apply to leases, and before the Settled Land Act, 1882, a tenant for life could not make a separate lease of mines and minerals apart from the surface. The land could not be divided into horizontal sections for the purpose of leasing, and the tenant for life was only able to demise the entirety of any part demised from the surface downwards: *Dayrell* v. *Hoare*. (1)

The present leasing powers are contained in ss. 6 to 13 and s. 17 of the Act, and do not authorize a lease of the surface reserving the minerals. Such a lease does not reserve the best rent, as required by s. 7.

C. H. Lindon, for the vendor. The ratio decidendi of *Buckley* v. *Howell* (2)—namely, that a sale of the surface without the minerals gives the tenant for life an unfair advantage—does not apply to leases, the unfair advantage merely being that the tenant for life could work the minerals reserved as well as the minerals under new land purchased with the proceeds of surface sales. In leases there is no new land to be purchased. It was, therefore, quite unnecessary to provide for leases in the Confirmation of Sales Act, 1862. Under the

(1) (1840) 12 Ad. & E. 356, 369. (2) (1861) 29 Beav. 546.

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Settled Land Act, 1882, s. 6, the tenant for life may lease for any purpose whatever, whether involving waste or not; and s. 13, by authorizing him to accept a surrender with an exception of mines and minerals and to grant a new lease, implies that a severance is lawful. The remainderman is not injured, as he can still lease the minerals. Again, the lease is good under s. 20, which provides that the deed granting the lease "to the extent and in the manner to and in which it is expressed or intended to operate and can operate under the Act is effectual to pass the land conveyed": *Mogridge* v. *Clapp*. (1) Sect. 17 neither expressly authorizes nor prohibits a lease of the surface separately. If there is any defect in the lease, it is cured by the Leases Acts, 1849 and 1850 (12 & 13 Vict. c. 26; 13 & 14 Vict. c. 17), which apply to leases under the Settled Land Acts: 1 Key and Elphinstone, 6th ed. p. 852. If so, it is a good lease in equity, as the vendor is in possession: *Walsh* v. *Lonsdale*. (2)

No reply was called for.

KEKEWICH J. In my opinion the purchaser's objection is sound. The lease was granted by a tenant for life, who had the usual powers of leasing under the Settled Land Act, 1882, including a power to let on building lease for ninety-nine years. The Act, however, provides for the grant of a longer term with the sanction of the Court. That sanction was obtained, but it only empowered the tenant for life to grant a longer term. He got no further assistance from the Court, and, except in that one respect, he was relegated to the powers of the Act. Sect. 6 provides that a tenant for life may lease the settled land or any part thereof, or any easement, right, or privilege of any kind, over or in relation to the same, for any purpose whatever, whether involving waste or not, for any term not exceeding—(i.) In case of a building lease, ninety-nine years; (ii.) In case of a mining lease, sixty years; (iii.) In case of any other lease, twenty-one years. It is shewn by that section that leases of minerals may be granted; but the question is whether

(1) [1892] 3 Ch. 382. (2) (1882) 21 Ch. D. 9.

a building lease of the surface only may be granted with a reservation of the minerals. The section provides that a tenant for life may lease the settled land "or any part thereof," and it is contended that the surface and the minerals are each part of the land, according to the old rule that the ownership in land extends from heaven to Tartarus. But, as I understand the law recognised by the Legislature in the Confirmation of Sales Act, 1862, it is not correct to speak of a mere horizontal stratum as a separate part of the land, and capable of being separately demised. This is well expressed by Littledale J. in *Dayrell* v. *Hoare* (1): "The demise must be of the whole which covers the part demised . . . . I think the grant bad, on the simple ground that the entirety in the particular part is not demised."

The phrase "any part thereof," must be taken in its ordinary sense—that is, so many square feet of surface, and the whole of that part is not demised if the minerals are excepted. There is, therefore, no power to demise the surface and reserve the minerals. Again, this lease is not a demise of "any easement, right, or privilege," and I do not see that the words "whether involving waste or not" make any difference to the construction of the section on this point. There are one or two other sections to which I must refer. Sect. 17 provides that a sale, exchange, partition, or mining lease may be made either of land, with or without an exception or reservation of all or any of the mines and minerals therein, or of any mines and minerals. That shews that the Legislature had in view the possible necessity of separating the surface from the minerals on the grant of a mining lease; but it does not shew that a building lease may be granted with an exception of the minerals. On the contrary, it shews that the Legislature was aware of the necessity of a severance in the one case and not in the other. There is a batch of provisions in s. 13 dealing with surrenders, and providing that a tenant for life may accept a surrender of any lease in respect of the whole land leased, or any part thereof, with or without an exception of all or any of the mines and minerals therein, or in respect of mines and

(1) 12 Ad. & E. 356, 369.

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minerals, or any of them, and on a surrender he may make a new lease of the land or mines and minerals surrendered, and comprising, if desired, additional land or mines and minerals. There are difficulties in the construction of the section not requiring any present solution, but the section only contemplates the necessity of accepting surrenders and granting new leases; and in that view larger powers are granted, so that where the lease is for a longer term than authorized by the statute it may be surrendered and a fresh lease granted. This meets a state of circumstances that frequently occurs, but it does not affect the present question. If I am right, the vendor's lease is bad. But the defect is said to be remedied in two ways. In the first place, s. 20 provides that on a lease the tenant for life may as regards land leased, or intended so to be, convey or create the same by deed to the uses and in the manner requisite for giving effect to the lease, and such a deed, to the extent and in the manner to or in which it is expressed or intended to operate and can operate under the Act, is effectual to pass the land conveyed. But to pray this in aid of the lease begs the whole question. If the lease can operate under the Act there is no question at all.

In the second place, it is said that the Leases Acts, 1849 and 1850, apply to leases under the Settled Land Act, 1882. But those Acts only apply to forms and ceremonies of leases under powers, and not to matters of substance. To hold that they make a lease of this kind valid would be tantamount to saying that the tenant for life may grant any lease he likes in total disregard of all the provisions of the Settled Land Act, 1882. The Leases Acts do not touch a case like the present.

I will deal with the last point—namely, the question of the reservation of the best rent—lightly. It occurred to me, and was suggested on behalf of the purchaser, that if a building lease is granted with a reservation of mines and minerals, the best rent cannot be reserved, because something is deducted on account of the mines and minerals. But the point is not of so much importance as I at first thought. If the vendor is right in saying the lease could be granted under the Settled Land Act, 1882, then the tenant for life probably obtained the best

rent for the part actually demised. If, on the other hand, there was no power to demise that part, the question of "best rent" does not arise. I therefore sustain the purchaser's objection. (1)

Solicitors: *Sewell, Edwards & Nevill; C. P. Eaton Taylor, for H. A. Matthews, Shanklin and Seaview.*

(1) The parties had arranged between themselves not to appeal.

G. R. A.

BYRNE J.
1899
Oct. 28, 31.

In re EVERSLEY.
MILDMAY *v.* MILDMAY.

[1899 E. 592.]

Will—Name and Arms Clause—Use of Surname.

Under a name and arms clause directing a devisee to assume and use the prescribed name "alone or together" with his own family name :—

Held, that the devisee had an option to use the prescribed name either before or after his own family name, and that the use of the prescribed name before his own surname was a sufficient compliance with the terms of the devise.

D'Eyncourt v. *Gregory*, (1875) 1 Ch. D. 441, distinguished.

ADJOURNED SUMMONS.

This was an application by the tenant for life of an estate settled by the will of the late Charles, Viscount Eversley for the opinion of the Court whether what the applicant proposed to do would be a sufficient compliance with a name and arms clause contained in the said will.

The facts, so far as material, were as follows :—

The testator, after settling the Heckfield Place estate, in the counties of Southampton, Wilts, and Berks, on his daughters successively for life, and then on his grandson (the present applicant) Gerald Anthony St. John Mildmay for life, with remainder to his first and other sons in tail male, with divers remainders over, declared that every person who should become entitled as tenant for life to the actual possession or to the receipt of the rents and profits of the settled estate, who should not then use and bear the surname and arms of "Shaw-Lefevre," should within one year after he or she should so become entitled "take upon himself or herself and use in all deeds or writings which he or she shall sign and upon all occasions the surname of 'Shaw-Lefevre' alone or together with his or her family surname and quarter the arms of 'Shaw-Lefevre' with his or her own family arms, and should within the said one year apply for and endeavour to obtain a proper licence from the Crown or take such other steps as may

be requisite to authorize him or her to take use and bear the said surname and arms of 'Shaw-Lefevre'": the testator then went on to provide that, in case any person should refuse or fail to comply with this direction, the limitations in his or her favour should absolutely determine.

The testator died in December, 1888; the present applicant became tenant for life in possession in April, 1899, and he now proposed to take and use the surname of "Shaw-Lefevre" immediately before his own family surname, as "Shaw-Lefevre St. John Mildmay," and to quarter his own arms with the arms of Shaw-Lefevre as directed, and he now applied under Order LV., rr. 3, 4, and Order LIV.*a* of the Rules of the Supreme Court, 1883, for the opinion of the Court whether his so doing would be a sufficient compliance with the terms of the will to prevent the limitations in his favour from determining.

Vaughan Hawkins, for the tenant for life. This is a direction to take a particular surname either "alone or together with" the family name, but there is nothing to shew which name is to come first. In *Bennett* v. *Bennett* (1) the condition was held to have been complied with by the use of the prescribed name before the family surname; in *D'Eyncourt* v. *Gregory* (2) the addition of the prescribed name was required, but in this case the wording of the clause was different: the devisee there was to "assume the surname of Gregory." The present clause gives the devisee an option—this is very often done: Davidson on Settlement, 3rd ed. vol. iii. Part I., p. 355; Bythewood's Precedents, vol. xi. 3rd ed. p. 854. If it is desired to provide that the prescribed name shall be the last or only name, it is usual to say so in express terms: Vaizey on Settlement, p. 1274; Butler's Notes to 2 Co. Litt. 327 a.

[BYRNE J. referred to Sanders on Uses, 5th ed. 447.]

This being the practice of conveyancers, it would seem to be a sufficient compliance with the terms of the devise if the tenant for life takes the name of "Shaw-Lefevre" together

(1) (1864) 2 Dr. & Sm. 266. (2) 1 Ch. D. 441.

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with, but immediately before, his family name of "St. John Mildmay."

Beaumont, for the tenant in tail, who was an infant, did not oppose or take any part in the argument.

Rowden, Q.C., and *Goddard*, for the trustees of the will. We do not oppose so long as what the tenant for life does is a compliance with the will. The testator directs that any tenant for life whose "surname" is not the prescribed name is to take the "surname" or supername of "Shaw-Lefevre"—this means that "Shaw-Lefevre" must be the last name: *Barlow* v. *Bateman*. (1)

BYRNE J., after stating the facts and reading the name and arms clause as above set out, continued:—The plaintiff now asks the opinion of the Court whether it will be a sufficient compliance with this condition if he takes the name of "Shaw-Lefevre" and uses it before the name of "St. John Mildmay." The will which is before me is an artificially drawn will and uses terms of art. It is obviously the work of a lawyer, or of some one familiar with conveyancing, who has made use of one of the regular forms. It is not the will of a man using inartificial or untechnical expressions—what has sometimes been referred to as a home-made will.

These clauses have been known for many years, and occur in text-books covering a considerable period of time. In Butler's Notes to 2 Co. Litt. 327 a, published in 1787, a form is given in which provision is made that the party is to take "the surname of Browne only, and take and use no other surname; and quarter the arms of Browne with their own respective family arms"; and so forth. As drawn it is a form to be used where it is desired that the surname required to be taken shall be taken in substitution for the surname which may then be used. I find also in Appendix I. to the first volume of Sanders on Uses, 5th ed., which was published in 1844, at p. 447, a precedent entitled, "Proviso shifting the use upon neglect or refusal to take a name, and bear certain arms." There the form runs: "take and use the surname of L. only, and no

(1) (1730) 3 P. Wms. 65.

other surname, and to quarter the arms of L. with his own family arms." Mr. Bythewood in the third edition of his collection of precedents of wills, published in 1849, includes as a common form a clause which runs: "apply for and obtain an Act of Parliament, or Her Majesty's licence, authorizing him or her to use the surname of —— [*testator's surname*], either alone or in addition to his or her own surname." And then in brackets, obviously intended as an alternative form, occur these words: "but so nevertheless that the surname of —— shall be the last or principal name." The last text-book to which I need refer is Davidson, and the particular volume is that containing the introductory observations on settlements published in 1873. These were the work of the late Mr. Waley, an eminent conveyancer. I find on page 355 of this volume this passage: "The form in this collection requires the use of the prescribed surname, together with the former family surname; but the clause may give the option of assuming the prescribed surname by way of substitution, or of addition, and in the latter case may require that it shall be the last and principal name." I think I am justified in looking at the text-books to which I have referred for the purpose of ascertaining what is and has been the practice of conveyancers in the matter of drawing clauses of this description. In the absence of any direct authority, I look at these precedents and bear in mind the fact that the clause is a penal clause which has to be construed strictly, but fairly of course, in the sense that the Court ought not to strain the words if it is satisfied that the testator has given a legitimate expression of his intention to impose this obligation on the objects of his bounty. Bearing this in mind, I am of opinion that this clause does not impose the obligation on the applicant to take and use the name of "Shaw-Lefevre" after the family surname of "St. John Mildmay." It is, I think, an illustration of the option referred to in the passage which I have read from Davidson, and leaves the applicant at liberty to assume the surname of "Shaw-Lefevre" instead of his family surname, or to use the surname of "Shaw-Lefevre" in addition to his family surname, but without imposing on him the obligation that that addition is to

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be an addition at the end of, or after his name of, St. John Mildmay.

Now, the only thing that has caused me any difficulty is the case of *D'Eyncourt* v. *Gregory* (1), before the late Master of the Rolls; but the name and arms clause in that case is of a different description, and makes use of different language from that used in the clause before me; the material words (2) are—"assume and take upon himself . . . . and use . . . . the surname of 'Gregory' and assume and take and use the arms of 'Gregory' either alone or quartered with his her or their own family arms"; and in that case the Master of the Rolls said he was clearly of opinion that the use of the surname of "Gregory" before that of "Welby" was not a sufficient compliance with the conditions contained in the will. Now, in the present case there is this clear distinction, namely, that the testator gives an option to the applicant to use the prescribed name "alone or together with his or her family surname": that by itself would distinguish this case from *D'Eyncourt* v. *Gregory* (1), but as a matter of fact I do not think that the clause in *D'Eyncourt* v. *Gregory* (1) can be regarded as a clause equivalent to the clause used in the present will; and upon the construction of the present will I have come to the conclusion that I am justified in making a declaration to the effect that the taking by the tenant for life of the name of "Shaw-Lefevre" before his family name of "St. John Mildmay" will be a sufficient compliance with the terms of this clause so as to prevent the gift over from taking effect.

Solicitors: *Warrens; Peacock & Goddard, for H. & C. Collins, Reading.*

(1) 1 Ch. D. 441. (2) 1 Ch. D. 442.

W. C. D.

BYRNE J.

1899

Oct. 31;
Nov. 1, 7.

In re NORTON.
NORTON *v.* NORTON.

[1899 N. 569.]

Practice—Partition Action—Real Estate of Infant—Request—Order for Sale—Conversion—Carrying over Infant's Share—Partition Act, 1876 (39 & 40 *Vict. c.* 17), *s.* 6.

The judgment in a partition action, brought by an infant as sole plaintiff by his next friend, contained a request for sale by the plaintiff and other persons, defendants, claiming to be entitled to the entirety of the property, directed a sale, if the parties other than the infant plaintiff were found entitled to a moiety, and reserved liberty to apply for a sale if it should appear that the defendants were not so entitled; the master having certified that the defendants were entitled to a moiety, the property was sold under the judgment without further order. The infant having died before the proceeds of sale were paid out of court:—

Held, that there had been no conversion of the infant's share, and that it must be dealt with as realty.

Semble, the law laid down by *Foster* v. *Foster*, (1875) 1 Ch. D. 588, still holds good, notwithstanding the Partition Act, 1876, s. 6, and the dicta of Jessel M.R. in *Wallace* v. *Greenwood*, (1880) 16 Ch. D. 362.

Where an infant by a next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate.

Howard v. *Jalland*, W. N. (1891) 210, examined and approved.

Adjourned Summons.

The question raised by this application was whether the share of an infant plaintiff in a partition action in the proceeds of sale of real estate was to devolve on his death as realty or personalty, the principal point argued being whether the order for sale had effected an out and out conversion.

The facts, so far as material, were as follows:—

Edward Henry Norton, an infant, being absolutely entitled in possession to two undivided sixths of certain freehold hereditaments, and also to another undivided sixth of the same hereditaments subject to an estate by the courtesy, in October, 1895, commenced the action of *Norton* v. *Norton* [1895 N. 1348] as sole plaintiff, by his mother as next friend, against the three persons who were entitled to the remaining three undivided sixths of the said hereditaments and the tenant by the courtesy.

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The statement of claim contained the usual allegations that it would be more beneficial to the persons interested in the said hereditaments that the same should be sold and the proceeds distributed among them than that the same should be partitioned, and that it was to the interest of the plaintiff that the said hereditaments should forthwith be sold and his share of the proceeds invested for his benefit; the plaintiff then claimed a sale and distribution amongst the parties entitled thereto, or, in the alternative, partition. The defendants put in a statement of defence in which they admitted all the allegations in the statement of claim, submitted that the premises ought to be sold and distributed, and objected to a partition.

The judgment in this action, made January 25, 1896, was as follows: After reciting that the plaintiff and the defendants, "who together claim to be absolutely entitled to the hereditaments," by their counsel requested a sale, it ordered "An inquiry who are the persons interested in the hereditaments and premises in the pleadings mentioned and for what estates and interests and in what shares and proportions and whether they are parties to this action: and in case it shall be certified that all the persons interested are parties to this action and that the defendants [naming them] are interested to the extent of one moiety or upwards in the said hereditaments It is ordered that the said hereditaments be sold. . . . . But in case it shall be certified that any of the persons interested are not parties to this action or that the defendants are not entitled together to one moiety or upwards of the said hereditaments," then there was to be liberty to apply in chambers for an order for sale. No evidence was entered in this order as having been read, and it appeared that the order was made on the admission of facts by the pleadings.

The master by his certificate of March, 1897, certified that all the persons interested were parties, and the shares in which they were entitled, namely, the plaintiff to three-sixths, and the defendants to the remaining three-sixths as already stated. The sale of the property was thereupon proceeded with, and the purchase-money was ultimately paid into court by the purchaser.

By the order on further consideration of February 26, 1898, the fund in court was distributed among the parties entitled thereto, the shares of the infant plaintiff being carried over to a separate account—"The account of the shares of . . . . to which the plaintiff Edward Henry Norton an infant is entitled."

On January 3, 1899, the infant plaintiff died, and on February 13, 1899, letters of administration of all the estate which by law devolved to and vested in his personal representative were granted to his mother. The mother subsequently applied in chambers in the partition action to have the funds so standing to the credit of the infant plaintiff paid over to her, as his personal representative, when the question was raised whether the fund in court ought to be treated as realty or personalty, and the judge directed the present summons to be taken out by the infant's mother for the determination of this question.

Rowden, Q.C., and *W. M. Cann*, for the plaintiff, the mother of the infant. The Partition Act, 1868, introduced the element of request enabling parties individually or collectively interested to the extent of a moiety to "request" a sale: this element was extended to the case of an infant or married woman by the Partition Act, 1876, s. 6, and now where an infant by his guardian ad litem requests a sale the order for sale operates as a complete conversion: *Wallace* v. *Greenwood*. (1) This case alters the rule laid down by *Foster* v. *Foster*. (2) Simpson on Infants, 2nd ed. p. 85, and Seton, 5th ed. p. 1552, state that this seems to be the result of *Wallace* v. *Greenwood*. (1) The guardian and next friend of this infant plaintiff would have authority to request a sale on his behalf: *Rimington* v. *Hartley*. (3) [*Crookes* v. *Whitworth* (4) was also referred to.] An order for sale properly made effects a conversion from the date of the order: *Hyett* v. *Mekin*. (5) The money in court, therefore, is personal estate and goes to the legal personal representative, the mother. The only authority against this

(1) 16 Ch. D. 362.
(2) 1 Ch. D. 588.
(3) (1880) 14 Ch. D. 630.
(4) (1878) 10 Ch. D. 289.
(5) (1884) 25 Ch. D. 735.

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contention is *Howard* v. *Jalland* (1); but that case is distinguishable on the ground that in the present case the whole object of the action was a sale.

Mulligan, Q.C., and *H. Charlton Hawkins*, for the heir-at-law. The rule laid down by *Foster* v. *Foster* (2) has not been altered by s. 6 of the Partition Act, 1876. The broad principle upon which cases of this kind should be determined as between heir-at-law and personal representative is laid down in *In re Barker*. (3) Sect. 6 of the Partition Act, 1876, does not affect the proceeds of sale: it merely enables a sale to be made, and it should be read into the Partition Act, 1868, before s. 8, which deals with the application of proceeds of sale. The dicta in *Wallace* v. *Greenwood* (4) relied on by the plaintiff are inconsistent with this view: that decision dealt only with the share of a married woman who was entitled to immediate payment. *Mordaunt* v. *Benwell* (5) is in favour of the contention of the heir-at-law; and so is *Howard* v. *Jalland* (1), as far as can be seen from the short report in the *Weekly Notes*. On the authorities, therefore, we contend that there has been no conversion. Then we say the form of the order for sale is so framed that the request of the infant was immaterial: as a fact, the sale seems to have been made on the request of the defendants, who were also entitled to a moiety. On this ground, also, there has been no conversion.

[*Davis* v. *Ingram* (6) and *Porter* v. *Porter* (7) were also referred to.]

Rowden, Q.C., in reply. In *Mordaunt* v. *Benwell* (5) there was no request for sale. If the old rule as to reconversion remained unaffected by s. 6 of the Partition Act, 1876, the dicta in *Wallace* v. *Greenwood* (4) would never have been made. The request if acted on is the test, and *Wallace* v. *Greenwood* (4) lays it down that the request can be made by the person who represents the infant in the action; then conversion follows: the fact that there are other persons interested in a moiety who ask for a sale cannot make any difference.

(1) W. N. (1891) 210.
(2) 1 Ch. D. 588.
(3) (1881) 17 Ch. D. 241.
(4) 16 Ch. D. 362.
(5) (1881) 19 Ch. D. 302.
(6) [1897] 1 Ch. 477, 478.
(7) (1888) 37 Ch. D. 420.

[At the conclusion of the arguments, his Lordship asked to be supplied with copies of the judgment and orders made in *Howard* v. *Jalland.* (1)]

Cur. adv. vult.

Nov. 7. BYRNE J. Two questions were argued before me, the broader one being whether or not a sale ordered by the Court under the provisions of the Partition Acts of 1868 and 1876, upon a request for sale made on the part of an infant by his next friend, effects such a conversion of his real estate as to be free from any equity for reconversion on the part of the infant's heir, in the event of his dying under the age of twenty-one.

It is clear that but for the 6th section of the Act of 1876 such an equity would exist: see *Foster* v. *Foster* (2); and I doubt whether Sir George Jessel in the case of *Wallace* v. *Greenwood* (3) meant to lay down that this equity for reconversion on the part of the heir would be lost, simply by reason of the sale having been made at the request of the infant, the request being made for a sale under a special statute, involving statutory incidents, including a provision for reinvestment of the proceeds of sale in real estate until the infant, being of full age, could ask for payment as to a person absolutely entitled. As the case of *Howard* v. *Jalland* (1) has been referred to, and as I have been furnished with office copies of the judgment and orders made in that case, I may state that it appears that in that case an infant by a next friend was one of several plaintiffs, and that the judgment was prefaced as follows: "and the plaintiffs and defendants who claim to be interested in a moiety of the hereditaments in the statement of claim mentioned, by their counsel requesting a sale thereof, and a distribution of the proceeds instead of a division of the said hereditaments between or among them." The judgment then proceeds: "this Court doth order that an inquiry be made who are the persons interested in the hereditaments and property in the pleadings mentioned and for what estates and

(1) W. N. (1891) 210. (2) 1 Ch. D. 588.
(3) 16 Ch. D. 362.

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interests and in what shares and proportions and whether they are parties to this action. And if it shall be certified that all persons interested are parties to the action It is ordered that the said hereditaments be sold out of court"; with a consequential direction that the purchase-money should be paid into court, "but if it shall appear that any of the persons interested are not parties to this action then It is ordered that any of the persons interested collectively or individually to the extent of one moiety or upwards in the said hereditaments be at liberty when it shall have been certified that the persons who ought to be served with notice of this judgment have been so served or that service of such notice is dispensed with to apply at chambers for a sale of the said hereditaments"; the judgment reserves the further consideration with liberty to apply. The order for sale is dated June 17, 1891. It runs: "the judge being satisfied that upon the evidence of the chief clerk's certificate dated December 9, 1890, all persons interested in the hereditaments and property in the pleadings mentioned are before the Court, or bound by this order for sale, Doth order that the same hereditaments and property be sold out of court," the purchase-money to be paid into court with consequential directions. Then on the further consideration, after directing the taxation of costs, it is ordered "that the funds in court be dealt with as directed by the schedule hereto." And in the schedule there is a direction to "carry over two-fifteenths" to "the account of infant plaintiff Wallace Howard as real estate," and to "carry over remaining one-fifteenth" to "account of Sarah Jane Howard entitled for life in respect of dower with remainder to Wallace Howard as real estate." This case appears to me to be an authority for saying that where an infant by a next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate.

In the present case, however, it does not appear to me to be necessary to decide whether this case is reconcilable with some of the observations in *Wallace* v. *Greenwood*. (1) I have to

(1) 16 Ch. D. 362.

deal with a special form of judgment which, in my opinion, precludes the view that the Court acted upon the request of the infant in directing the sale which was actually carried out.

In the present case the action was brought by an infant as sole plaintiff by his next friend, and the writ and statement of claim asked for a sale of the real estate, to one moiety of which the infant plaintiff was absolutely entitled, subject to a tenancy by the courtesy subsisting in one of the defendants. The defendants were between them entitled to the other moiety. [His Lordship having read the judgment as above set out, continued:—] The sale took place upon the footing of the certificate shewing that the defendants were interested to the extent of one moiety and upwards. Now, the order does not provide for a sale in case the defendants and the plaintiff together are entitled to the extent of one moiety or upwards, nor does it provide for the sale in the event of the plaintiff being entitled to the extent of one moiety or upwards; and in effect the Court reserves for future consideration, if necessary, the question whether the sale is for the benefit of the infant, in the event of the defendants not being entitled to ask for an order for sale. No evidence was read on the motion for judgment; perhaps it was not necessary in the present case, though it would have been usual and proper if the Court intended to determine the question whether it was for the benefit of the infant or not that a sale should be directed. No sale founded upon the plaintiff's interest is directed. According to the form of this judgment, supposing it had turned out upon making the inquiry that the infant was entitled to more than a moiety, I think that the Court would then have had to be satisfied that a sale was for the benefit of the infant before ordering one.

The result therefore is that I must answer the question raised by this summons by a declaration that the funds still in Court in the action of *Norton* v. *Norton* are, as between persons claiming the real and personal estate of the infant Edward Henry Norton, in the nature of real estate, and ought to be dealt with accordingly.

Solicitors: *Charles Sawbridge & Son.*

W. C. D.

FARWELL J.

1899

Nov. 2.

HEPWORTH *v.* PICKLES.

[1898 H. 3698.]

Vendor and Purchaser—Freehold Premises—Restrictive Covenant Prohibiting Sale of Beer and Spirits—Continuing Covenant Broken for an Uninterrupted Period of Twenty-four Years—Waiver.

By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beerhouse.

Shortly after the date of the conveyance beer and spirits were sold in one of the houses erected on the land, and continued to be openly sold for upwards of twenty-four years:—

Held, in an action by a purchaser to rescind a contract for sale of that house on the ground of the existence of this restrictive covenant, that it must be presumed from the uninterrupted user of the premises as a beerhouse for twenty-four years, that there had been a waiver or release of the covenant.

Gibson v. *Doeg*, (1857) 2 H. & N. 615, discussed and followed.

In the month of September, 1898, the plaintiff, who was a grocer and brewer, entered into a contract for the purchase of a freehold dwelling-house and shop, the property of the defendant, which was then being used as a grocer's shop.

The land on which the house and shop stood had been conveyed in 1874 by one Priestman to Hartley, who was the predecessor in title of the defendant. The conveyance contained a covenant by Hartley that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beerhouse, or for any other purpose than a dwelling-house, shop, or outbuilding, nor should any beer, wine, or spirits, or other intoxicating liquors, be sold on the said land, or in any shop or building thereon.

Prior to the plaintiff entering into the contract he was informed by the solicitor of the vendor that there was an off-licence for the sale of beer and spirits attached to the premises, and that the licence was in full force; but no mention was made of the restrictive covenant in the conveyance, and it was not till the delivery of the abstract that the plaintiff

discovered the existence of the restrictive covenant above mentioned.

Upon making this discovery the plaintiff objected to complete, and required the return of his deposit; but this the defendant declined to do, claiming the right to forfeit the deposit. The plaintiff thereupon commenced this action, claiming a rescission of the contract.

The evidence conclusively proved that for an uninterrupted period of twenty-four years beer and spirits had been sold on the premises.

Badcock, *Q.C.*, and *Church*, for the plaintiff.

[FARWELL J. This is a question of waiver. There was a case of *In re Summerson* (1), before Romer L.J. when he was a judge of the Chancery Division, not long ago, very similar to this, in which he followed *Gibson* v. *Doeg*. (2)]

Gibson v. *Doeg* (2) was a case of lessor and lessee; but this is one of vendor and purchaser of real estate, and although there may have been a waiver on the part of Priestman, the original vendor to Hartley, there may be other persons, infants or others claiming through him, who would have a right to enforce the covenant.

The silence of the vendor's agent was equivalent to a representation that there was no prohibitive covenant: *Flight* v. *Barton*. (3)

Hughes, *Q.C.*, and *Clayton*, for the defendant, were not called upon except on the question of costs.

FARWELL J. In this case the plaintiff entered into a contract on September 23, 1898, for the purchase of a dwelling-house and shop situate in Lilycroft Road, Bradford, occupied by Mr. William George, with the conveniences thereto belonging, the shop having an off-licence for the sale of beer and spirits. The house in question was conveyed in 1874 to a Mr. Hartley by a conveyance which contained a covenant that "no shop or other building to be erected on the said plot of land, or any part thereof, shall at any time hereafter be used as an inn,

(1) See post, p. 112. (2) 2 H. & N. 615.
(3) (1832) 3 My. & K. 282.

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tavern, or beerhouse, nor for any other purpose than as a dwelling-house or shop as aforesaid, nor shall any wine, beer, or other intoxicating liquors be sold on the said plot of land or in any shop or other building thereon."

I find as a fact that, very shortly after the date of that conveyance, beer, and, after a short interval, spirits, were both sold at that shop and have ever since been sold openly with the licence appearing in large letters over the door for upwards of twenty-four years. That being so, the first question I have to determine is whether the shop is in fact now bound by the restrictive covenant. In my opinion it is not so bound, although on its construction the covenant is of course a continuing covenant. I think the case is covered by the authority of *Gibson* v. *Doeg* (1), and by the unreported case, which I have referred to, before Romer J. of *In re Summerson*. (2) I apprehend the law is well stated by Pollock C.B. [His Lordship read the passage referred to and stated by Romer J. as set out in the note (2), and proceeded:—]

That I take to mean this—that if you find a long course of usage, such as in the present case for twenty-four years, which is wholly inconsistent with the continuance of the covenant relied upon, the Court infers some legal proceeding which has put an end to that covenant, in order to shew that the usage has been and is now lawful, and not wrongful. This case was followed by Romer J. in the case I have mentioned, which is in some ways a stronger case. It was a case in which there was a sale under the order of the Court, the corporation of Newcastle being the lessors. There was a similar restrictive covenant. The actual lease was anterior to the root of title fixed in the case, and there was a very stringent covenant. In that case it was also shewn that for thirty years the house had been carried on as a public-house. Romer J. held, following *Gibson* v. *Doeg* (1), that there must be presumed to have been an actual waiver or release.

I propose to follow those authorities, and I find in this case that the covenant has been waived or released, and that there is no longer any doubt or question about it.

(1) 2 H. & N. 615. (2) See post, p. 112.

Mr. Badcock suggested that there might be other persons who might be able to sue upon it besides Mr. Priestman, who must have known the business that has been carried on at the shop for a long course of years. As at present advised, I cannot see any chance of any other person having such right; the user having been open and notorious, any such person would be equally bound by the fact that he must have known of it. The case comes to this—that a good title can be made.

But there remains the question of costs. It is obvious that Mr. Turnbull, the vendor's solicitor, knew of the object for which the plaintiff desired to buy this shop. I have heard arguments to induce me to say that it was simply the question of licence or no licence, and that nothing was said about the selling of beer: it was a mere question whether the licence was affected or not. That appears to me to be adhering to the letter and neglecting the spirit. The whole object of the purchaser was, not to have an off-licence for the pleasure of possessing a licence, but to sell beer, and Mr. Turnbull of course knew quite well that the primary object was to use this shop for the sale of beer and spirits under the off-licence. The off-licence happens to be the necessary thing to the legality of such a sale. In that respect, no doubt, the licence was insisted on, but the primary object was to sell beer. Nothing was said as to the existence of this covenant, because Mr. Turnbull knew nothing about it. He said very fairly, and, in my opinion, properly, "I should have mentioned it if I had known of it." It appears to me that the plaintiff in this case is entitled to complain that he was not told before he entered into the contract of the existence of the covenant. I quite accept Mr. Turnbull's statement that he did not know of it; but he was the vendor's solicitor, and had got the documents in his possession or power. As he could get the mortgagees to produce them for the purchaser to see them, so he could have got the mortgagees to produce them in order to inform himself of their contents. In my opinion he was bound to have known of the existence of the covenant before he made any statement such as he did with regard to the off-licence which would induce the intending purchaser to believe that there was no question as to his

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having the effectual enjoyment of that off-licence. That being so, and again following the precedent set me by Romer J., although I dismiss this action, I dismiss it without costs.

Solicitors: *Prior, Church & Adams, for J. H. Milner, Leeds; Jaques & Co., for George Turnbull, Bradford.*

G. M.

NOTE.

Romer J. 1899. Feb. 17, 23.

In re SUMMERSON.
DOWNIE *v.* SUMMERSON.

[1898 S. 1192.]

THIS was a summons taken out in the action by the purchaser of certain leasehold premises which had been sold under an order of the Court, asking that she might be discharged from her purchase.

The premises, together with other premises, were held under a lease from the corporation of Newcastle, which contained a clause of forfeiture if the premises should at any time be used as an inn, alehouse, or spirit shop.

It appeared from the evidence that the premises had with the knowledge of the corporation been uninterruptedly used as a public-house for upwards of thirty years, and were so used at the time of the sale.

Farwell, Q.C., and *R. B. Phillpotts*, for the purchaser.

Neville, Q.C., and *Younger*, for the vendor.

O. L. Clare and *William Baker*, for other parties.

ROMER J. Substantially there can be no question as to the purchaser getting a good title. This property was carried on as an inn even before the date of the lease. It was a lease, as I understand, of this property and other property, and a general covenant extending over all the properties as to how it should be carried on; and a covenant, among other things, that the business of a public-house should not be carried on. I need not refer to the fact that the public-house was used as a public-house before the date of the lease. From the date of that lease to the present time, a period of over thirty years, that house has been carried on openly and avowedly as a public-house, and that is not controverted; and, in addition to that, the assignment of these premises, which has been registered in the corporation register, describes the premises as being a public-house; and, what was still more important, their licence given to the lessee to assign to the vendors on this occasion has described the premises as being a public-house. Under those circumstances, it is perfectly clear that, for a period of over thirty years, to the knowledge, and I think I may say with the sanction, of the corporation, these premises have been used as a public-house. What is the conclusion? Inevitably that there has been a licence, and a binding licence, from the corporation to the lessees to use these premises as a public-house, or a release of this covenant, so far as it affects these particular premises, one way or the other. The case has no need of authority to support what I have stated. I refer to what was decided in *Gibson* v. *Doeg*, 2 H. & N. 615, which was not so strong a case as the one before me in several respects

What does Pollock C.B. say there in dealing with a question of this sort? He says (2 H. & N. 623): "We are of opinion that where a breach of covenant has continued for upwards of twenty years, and, with full knowledge of it, rent has been from time to time received, that fact may be left to the jury to say whether they will not presume a licence. It would be strange if a jury might presume a grant from upwards of twenty years' user, and yet be not at liberty to presume a licence. It is a maxim of the law of England to give effect to everything which appears to have been established for a considerable course of time, and to presume that what has been done was done of right, and not in wrong. That, practically, has caused a series of trespasses to constitute a right, so that it might be said a right has grown out of proceedings which are wrongful. But, in truth, it is nothing more than giving effect to notorious and avowed acquiescence. No person would have permitted a covenant to be broken for more than twenty years, unless he was aware that it was broken as a matter of right." Then he uses these significant words: "It is not necessary, in point of form, to send the case to a jury to find the facts which the judge may tell them they ought to presume."

On the facts before me, is there any substantial question which could be left to a jury, or any substantial question of law about which the purchaser here need doubt or say there was error? I think not. On the admitted facts before me, supported not only by the evidence of witnesses, but by the acts of the corporation themselves, it appears to me impossible that the corporation could raise a claim such as has been suggested, or for a moment attempt to prevent this house being further carried on as a public-house, or to determine the lease as being a breach of covenant.

For these reasons I think that the title which the purchaser gets is a good one. I need scarcely add that the corporation, so far as appears, have never for a moment suggested that what has been done by the lessees in the case before me has not been rightly done, or suggested that they would or could take any proceedings to prevent the house from being used as a public-house, or could determine this lease by reason of any breach of covenant in that respect. In other words, the objection, to my mind, is a purely theoretical objection. I make due allowance for the objection of the Court generally to force a title on a purchaser from the Court. But I think this case one where, looking at the conditions of sale and the whole of the facts of the case, the purchaser may justly, and therefore ought to be, compelled to complete, and I so adjudge.

Solicitors: *Pitchforth, King & Heelis, for Arnott, Swan & Walker, Newcastle-upon-Tyne; King, Wigg & Co., for H. Soden Bird, Newcastle-upon-Tyne; Williamson, Hill & Co.*

G. M.

C. A.
1899
KEKEWICH J.
Feb. 21, 22, 24.
C. A.
Nov. 9.

In re CLÉMENT & CIE.'S TRADE-MARK.

Trade-mark—"Addition"—Label—Distinctive Words common to the Trade—Disclaimer—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74.

On the registration, under the Patents, Designs, and Trade Marks Act, 1883, of a trade-mark consisting of a label, which contains as an essential part of it, not as an "addition" to it, words which are primâ facie distinctive, but are common to the trade, s. 74 does not apply, and the right to the exclusive use of those words need not be disclaimed by the owner of the mark.

MOTION on behalf of the Société Anonyme du St. Raphael Quinquina, dealers in a tonic wine called "St. Raphael Quinquina," asking that the register of trade-marks might be rectified by the removal from it of the mark No. 76,176, which had been on August 11, 1888, registered in class 3 by Messrs. Clément & Cie., or, in the alternative, by adding to the entry thereon of the said mark a disclaimer of any right on the part of Clément & Cie., or other the registered proprietor of the mark, to the exclusive use of the words "St. Raphael" or "Saint Raphael." The applicants had recently applied for the registration in the United Kingdom of a label bearing the name of "St. Raphael Quinquina." The Comptroller refused that application, because, by reason of the use of the words "St. Raphael," which occurred also in the mark, No. 76,176, he thought that the label of the Société Anonyme would be calculated to deceive. No appeal from this refusal was brought. Clément & Cie. traded as the Compagnie du Vin de St. Raphael, at Valence, Drôme, France, and also in London, and they had registered the mark No. 76,176, in class 3, for "Saint Raphael Tannin Wine."

It was admitted that the words "St. Raphael" were common to the trade.

The following is a representation of the trade-mark No. 76,176:—

SAINT-RAPHAEL
TANNIN WINE

Strengthening and digestive, this wine is an invigorating tonic, of most delicious taste, and more efficacious for convalescents and debilitated persons than iron or quinine. It is a sovereign remedy in cases of gastric debility, and anemia.

DOSE: half a wine glass after the meals.

The signature is repeated on the capsule which covers the bottle. Price 2 S. 6 D., or 30 S. dozen.

St Raphaël

As actually used by Clément & Cie. in their trade, the registered label was divided into two labels, the one containing the upper portion of the registered label (the device), the other containing the lower portion. These two labels were pasted on the bottles of wine, the label containing the device being placed immediately above the other. The words "St. Raphael" across the upper label were printed in red, no other part of either label being coloured.

The Patents, Designs, and Trade Marks Act, 1888 (51 & 52 Vict. c. 50), did not apply to this case.

The motion came on for hearing before Kekewich J. on Feb. 21, 1899.

C. A. 1899

CLÉMENT & CIE.'S TRADE-MARK, *In re.*

Warrington, Q.C., and *G. F. Hart*, for the applicants. The words "St. Raphael," whether representing the name of a place or the name of a seraph, were not fancy words capable of registration under s. 64 of the Patents, Designs, and Trade Marks Act, 1883: *In re Van Duzer's Trade-mark* (1); *Great Tower Street Tea Co.* v. *Smith* (2); *In re Sir Titus Salt, Bart. Sons & Co.'s Application* (3); *In re Magnolia Metal Company's Trade-marks.* (4) They were distinctive and common to the trade at the time of registration, and ought to have been disclaimed as "an addition" under s. 74: *Humphries & Co.* v. *Taylor Drug Co.* (5); *Burland* v. *Broxburn Oil Co.* (6); *Thompson* v. *Miller.* (7)

Ingle Joyce, for the Comptroller. The Comptroller does not object to having the mark expunged, but he contends that disclaimer under the Act of 1883, s. 74, can only be made in cases where it ought to have been made on the application for registration.

Sebastian, for the respondents. The words "St. Raphael" were fancy words when they were registered, as very few people in England had heard of such a place, any more than the respondents had. St. Raphael is not the name of a real person. Every one would have treated the words as fancy words: *In re Bovril Trade-mark.* (8) The cases cited are irrelevant, as the words have not been registered as a separate mark, or as an addition to the mark, but merely as part of the label, which never existed without them, so that s. 74 providing for the disclaimer of additions does not apply. The words are not distinctive. They form part of the name of the respondents' company, and the respondents are not required to disclaim part of their own name: *In re Smokeless Powder Company's Trade-mark.* (9)

Warrington, Q.C., in reply. The words "Smokeless Powder" were merely descriptive, and not primâ facie distinctive, as the picture shews. In *Burland* v. *Broxburn Oil Co.* (6) and

(1) (1887) 34 Ch. D. 623.
(2) (1889) 6 Rep. Pat. Cas. 165.
(3) [1894] 3 Ch. 166.
(4) [1897] 2 Ch. 371.
(5) (1888) 59 L. T. 820.
(6) (1889) 42 Ch. D. 274.
(7) (1895) 13 Rep. Pat. Cas. 35.
(8) [1896] 2 Ch. 600.
(9) [1892] 1 Ch. 590.

Thompson v. *Miller* (1) the words "Washerine" and "Roadster" were quite as much a part of the trade-mark as in this case.

Cur. adv. vult.

Feb. 24. KEKEWICH J. So much was made by the applicants of the distinctive character of the words "St. Raphael" on the respondents' label that I thought it right again to study the evidence, a further perusal of which has confirmed the impression that the applicants do not establish the geographical character of the words. I do not think the respondents adopted those words as intending to refer to any one of the French towns called St. Raphael. It by no means follows that they are not distinctive words, and inasmuch as they were common—that is, open to the trade—on May 11, 1888, the date of the respondents' application, it may be that the provision for disclaimer extends to them on that ground. I have found great difficulty in ascertaining any rule by which the Court is guided in deciding what is a fancy word within the meaning of the 64th section of the Patents, Designs, and Trade Marks Act, 1883, sub-s. 1 (*c*), and, if the words "St. Raphael" are not fancy words, then the applicants' argument based on the settled construction of the section and sub-section just mentioned deserves much consideration. I do not propose to say more on that point. The respondents take the point that these words "St. Raphael," which occur twice on their registered trade-mark, are not an addition within the meaning of s. 74 of the Act of 1883. The Act allows the addition of any distinctive word or combination of words to the distinctive device, mark, brand, heading, or label sanctioned by s. 64, and it is obvious that, in order thoroughly to understand what is a permitted addition, you must first understand the meaning of the language describing the thing to which the addition may be made. Notwithstanding the many cases which have been discussed and decided on this part of the Act, I have not succeeded in discovering any rule laid down for my guidance on this point. I doubt whether there can be found, and I certainly

(1) 13 Rep. Pat. Cas. 35.

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have not found, any explanatory definition by which I could bring to the test a proposed device or label or an addition thereto, and say whether what is proposed falls within the meaning of the Act. The nearest approach to a guide is to be found in the judgment of Chitty J. in *In re Smokeless Powder Company's Trade-mark* (1), or, perhaps I should more properly say, in the judgments of Fry L.J. and Lord Esher, which he there quotes. When studying the respondents' registered trade-mark—and, of course, it has been my duty to do this with some curiosity—I asked myself, which is the device or label and what are the added words? It seems to me that if I strike out the words " St. Raphael " I alter the whole character of the label, and it becomes something quite different from what it is now. Or, to use the language of Lord Esher, quoted by Chitty J., the truth is that the label does not consist of each particular part of it, but consists of the combination of them all, including the words " St. Raphael." It is noticeable that on the upper part of the label the respondents describe themselves as Compagnie du Vin de St. Raphael, to which words the applicants do not seek to extend the disclaimer for which they ask. It would be a strange result if the respondents were compelled to disclaim the exclusive use of the words written across the label or standing as a signature on the lower part of it, and yet were allowed to retain as part of their trade-mark their description above noticed; and it is also difficult to my mind to say why these latter words are not an addition to the distinctive device or label, if the words " St. Raphael " standing alone fall within that category. In my opinion the respondents are entitled to the judgment of the Court on this ground, and the application must be refused with costs.

G. R. A.

C. A.

The Société Anonyme appealed. The appeal was heard on November 9, 1899.

Neville, Q.C., Warrington, Q.C., and *G. F. Hart*, for the appellants. The words " St. Raphael " are not " fancy words "

(1) [1892] 1 Ch. 590.

within the meaning of s. 64 (1) of the Patents, &c., Act, 1883, because they are geographical.

[The argument on this point is not fully reported, because the decision of the Court turned on another point.]

The words "St. Raphael" are primâ facie "distinctive," and are an "addition" to the mark, and, as they are common to the trade, the right to the exclusive use of them ought to be disclaimed under s. 74, sub-s. 2. Any words may be added to a trade-mark; but if they are primâ facie "distinctive" and they are common to the trade, the exclusive right to use them must be disclaimed: *Burland* v. *Broxburn Oil Co.* (2); *Thompson* v. *Miller.* (3) A label is a good trade-mark if it is "distinctive" without reference to the words contained in it.

Sebastian, for Clément & Cie. Under s. 64, sub-s. 1 (*c*), a "distinctive label" may be registered as a trade-mark. We have registered a label, not the words "St. Raphael," and we claim no exclusive right to the use of those words. But they are an essential part of the label which we have registered, not an "addition" to it, and they need not be disclaimed under s. 74. That section does not apply: *In re Smokeless Powder Company's Trade-mark* (4); *In re Apollinaris Company's Trade-*

(1) By s. 64, sub-s. 1: "For the purposes of this Act, a trade-mark must consist of or contain at least one of the following essential particulars" (inter alia):—

"(*c*) A distinctive device, mark, brand, heading, label, ticket, or fancy word or words not in common use.

"(2.) There may be added to any one or more of these particulars any letters words or figures, or combination of letters words or figures, or of any of them."

Sect. 74: "(1.) Nothing in this Act shall be construed to prevent the Comptroller entering on the register, in the prescribed manner, and subject to the prescribed conditions, as an addition to any trade-mark" (inter alia)—

"(*b*) In the case of an application for registration of a trade-mark not used before the 13th day of August, 1875—

"Any distinctive word or combination of words, though the same is common to the trade in the goods with respect to which the application is made;

"(2.) The applicant for entry of any such common particular or particulars must, however, disclaim in his application any right to the exclusive use of the same, and a copy of the disclaimer shall be entered on the register."

(2) 42 Ch. D. 274.

(3) 13 Rep. Pat. Cas. 35.

(4) [1892] 1 Ch. 590.

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marks (1); *Pinto* v. *Badman*. (2) The two labels form one trade-mark. We should not object to the lower label being taken off the register, but then the registered label would not correspond to that which we actually use. We place both the labels upon our bottles.

In *Burland* v. *Broxburn Oil Co.* (3) it was the word "Washerine" which was claimed, not a label.

Neville, Q.C., in reply. If the argument for the respondents is well founded, the Act of 1883 is reduced to an absurdity; any one could register a word common to the trade by putting a wavy line round it and calling it a label. Here the Comptroller was himself deceived, and that shews that an ordinary trader would have been deceived. The *Apollinaris Case* (1) is quite distinguishable.

LINDLEY M.R. The difficulty of construing Acts of Parliament is one with which we have to grapple every day, but this Act of 1883 has given rise to much difference of opinion, and I am not sure that it will not still do so. Now, however, that we understand the case, I have arrived at the conclusion that the decision of the learned judge was right. Mr. Sebastian has brushed away a good deal of the dust which was raised by the ingenious arguments of the appellants' counsel by pointing out that the respondents are not claiming to be the registered owners of the words "St. Raphael," or of any fancy name, or, indeed, of anything except the label which they have registered. They were entitled under s. 64 to register a "label" as a trade-mark, and I think the learned judge was quite right in treating the words "St. Raphael," not as an "addition" to, but as part of the mark. Those words form part of the label—the thing which is registered—and there is no reason, therefore, for calling upon the registered owner to disclaim them under s. 74. That section applies to additions to, not to parts of, a registered mark or label. I have no hesitation in saying that the words "St. Raphael" are evidently part of the registered label, and not an addition to it. I do not intend to lay down any general rule or principle for

(1) [1891] 2 Ch. 186, 233. (2) (1891) 8 Rep. Pat. Cas. 181, 188, 191.
(3) 42 Ch. D. 274.

distinguishing between essential parts of a mark and additions to it. One can easily see that there might be cases in which it would be extremely difficult to say whether particular words were part of a mark or an addition to it. In the present case I think the words are obviously a part of the mark. That is a complete answer to the appellants' case, and the appeal must be dismissed. On the question whether the words could be regarded as "fancy" words, I will say nothing. The evidence is not altogether satisfactory, and there are difficulties in either view of the case. It is sufficient to say that the decision appealed from was right, and the appeal must be dismissed with costs.

SIR F. H. JEUNE. I am of the same opinion.

ROMER L.J. I agree. The upper label registered by the respondents was, in my opinion, in itself a perfect label, and the words "St. Raphael" are not an addition to it, but form part of it. It appears to me that the lower label was an "addition" in the sense in which that word is used in s. 64—that is, the words in it were added to the upper label. Sect. 64 permits that to be done, for it says that there may be added to any one or more of the particulars pointed out in that section, "any letters, words or figures, or combination of letters, words or figures, or of any of them." That being so, the registration of both labels (if I may for the moment refer to them as two separate labels) was right; and then, under s. 74, no disclaimer of the lower label is required, inasmuch as it is not primâ facie distinctive. The label was rightly registered as a whole—that is, the two labels together—without any disclaimer of the lower portion.

I desire to add that our judgment must not be understood as sanctioning the registration of words which in themselves would not constitute a proper trade-mark merely because some flourishes were colourably placed round them with the view of making out a distinctive or compound label, when in fact what was really intended to be registered was the words alone.

Solicitors: *Chappell, Griffith & Broadbridge; Frere, Cholmeley & Co.*

W. L. C.

C. A.
1899
Dec. 4, 5, 13.

BOOSEY *v.* WHIGHT.

[1898 B. 4658.]

Copyright—Music—Infringement—"Copy"—"Sheet of Music"—Mechanical Organ—Perforated Music Sheet—Musical Directions for Performance—Copyright Act, 1842 (5 & 6 *Vict. c.* 45), *ss.* 2, 15.

The defendants sold for use in a mechanical organ called an "Æolian" perforated rolls of paper representing the musical score of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the organ, and were unrolled by its mechanism when actuated by the performer, so that the passage of air through the perforations in the rolls into the pipes of the organ produced corresponding musical notes the pitch and duration of which were determined by the position and length of the perforations. The organ contained also stops, swells and pedals, whereby variations of pace and expression could be effected at the will of the performer; and in the margin of some of the rolls were directions as to time and expression which were also to be found in the plaintiffs' songs:—

Held (affirming Stirling J.), that the rolls, so far as they contained perforations, were part of the organ, and were not "copies" of "sheets of music" within the Copyright Act, 1842, and were, therefore, not an infringement of the plaintiffs' copyright; and also (reversing Stirling J.), that, apart from the plaintiffs' musical scores and when not used in connection with them, the plaintiffs' directions as to time and expression were not protected by their copyright.

Cross Appeals from the judgment of Stirling J. at the trial of the action. (1)

The learned judge held (1.) that the plaintiffs were not entitled to an injunction in respect of the defendants' perforated rolls or sheets; but (2.) that they were entitled to an injunction in respect of the words indicating pace and expression copied by the defendants on their rolls or sheets from the plaintiffs' sheets of music.

The plaintiffs appealed from the first part of the judgment, and the defendants from the second.

The appeals were heard on December 4 and 5, 1899.

Butcher, Q.C., and *Scrutton*, for the plaintiffs.

Moulton, Q.C., *T. Terrell, Q.C.*, and *Eustace Smith*, for the defendants.

(1) [1899] 1 Ch. 836.

The same arguments were adopted as in the Court below.

After counsel had been heard in reply on both appeals,

LINDLEY M.R. This case is one of such novelty and importance that we will take time to consider it.

Dec. 13. LINDLEY M.R., after stating that Sir F. H. Jeune concurred in the judgment about to be delivered, said:—The plaintiffs are entitled to copyright in three sheets of music. What does this mean? It means that they have the exclusive right of printing or otherwise multiplying copies of those sheets of music—i.e., of the bars, notes, and other printed words and signs on those sheets. But the plaintiffs have no exclusive right to the production of the sounds indicated by or on those sheets of music; nor to the performance in private of the music indicated by such sheets; nor to any mechanism for the production of such sounds or music. The plaintiffs' rights are not infringed except by an unauthorized copy of their "sheets of music." We need not trouble ourselves about authority from the plaintiffs; no question turning on the meaning of that expression has to be considered in this case. The only question we have to consider is whether the defendants have copied the plaintiffs' sheets of music. The defendants have taken those sheets of music and have prepared from them sheets of paper with perforations in them, and these perforated sheets, when put into and used with properly constructed machines or instruments, will produce or enable the machines or instruments to produce the music indicated on the plaintiffs' sheets. But is this the kind of copying which is prohibited by the Copyright Act; or rather is the perforated sheet made as above mentioned a copy of the sheet of music from which it is made? Is it a copy at all? Is it a copy within the Copyright Act? A sheet of music is treated in the Copyright Act as if it were a book or sheet of letterpress. Any mode of copying such a thing, whether by printing, writing, photography or by some other method not yet invented would no doubt be copying. So, perhaps, might a perforated sheet of paper to be sung or played from in the same way as sheets of music are sung or played from. But to

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play an instrument from a sheet of music which appeals to the eye is one thing; to play an instrument with a perforated sheet which itself forms part of the mechanism which produces the music is quite another thing. I have consulted Johnson's, Richardson's, and Murray's dictionaries to ascertain the meanings attributed to the word "copy"; and I do not myself think that the perforated sheet can be said to be a copy of the sheet of music unless the word "copy" is used in a very loose and inaccurate sense. Be this as it may, I cannot think or bring myself to decide that the perforated sheet is a copy of a sheet of music within the meaning of the Copyright Act. The fundamental ideas underlying the two are different and the uses to be made of them are fundamentally different. Music appeals to the ear, but a sheet of music appeals to the eye, and the observation of Bayley J. in *West* v. *Francis* (1) is applicable not only to engravings, but to all kinds of books, and the Copyright Act treats a sheet of music as it treats a book. He said, "A copy is that which comes so near to the original as to give to every person seeing it the idea created by the original." I do not say that the defendants' perforated rolls cannot possibly be regarded as sheets of music. They may possibly be so regarded by specially skilled persons who have learned to read the perforations. Conceding for the sake of argument that a person might be trained to play or even to sing from the perforated sheets, it is clear that they are not made to be so used, nor are they ever so used in fact; and we ought in my opinion to deal with the case on broad business lines and not on unpractical though theoretically possible assumptions. If these perforated rolls were new, it appears to me that their invention might be patented; and this could not, in my opinion, be said of any copy of any book. It may be true that the manufacture and sale of the perforated sheets diminish the sale of the plaintiffs' sheets of music. But it does not follow that the plaintiffs' copyright has been infringed; and I am of opinion that it has not. I regard the defendants' perforated sheets as part of a mechanical contrivance for producing musical notes; and I cannot think that manufacturers of musical instru-

(1) (1882) 5 B. & Al. 737, 743; 24 R. R. 541.

ments infringe any person's copyright by so constructing their machines and appliances to be used with them as to produce musical notes indicated on a sheet of music. On this broad and very important question, which so far as I know has never been raised before in this country, I am of opinion that the decision of Stirling J. is correct.

There is, however, another but comparatively subordinate question on which I am unable to agree with him. He has restrained the defendants from copying the directions on the plaintiffs' sheets of music to the person using them. The defendants' appeal from this part of the judgment ought, in my opinion, to succeed. The directions in the plaintiffs' sheets of music are no doubt protected by their copyright so long as they are used in connection with their musical scores. But apart from those scores the plaintiffs have no copyright in such directions. The directions are not in themselves a "sheet of music," nor are they a "sheet of letterpress separately published." Even if they were, they would be mere words, not sentences forming a literary composition in which copyright could be acquired. Upon this point the case is governed by *Hollinrake* v. *Truswell* (1), and the injunction granted by Stirling J. to restrain the use of these directions must be discharged.

The net result is that the plaintiffs' action wholly fails. Their appeal must be dismissed and the defendants' appeal allowed. The order appealed from must be varied by striking out the injunction, and judgment must be entered for the defendants with costs here and below.

ROMER L.J. I agree in thinking that the appeal of the plaintiffs should be dismissed. As the question involved is one of some importance, I desire to add a few remarks.

The rights under the Copyright Act of an author of a musical piece are—(1.) to prevent others from copying the published music regarded as a book; and (2.) to prevent the music itself being performed in public without the author's permission. But any one may perform the music in private by

(1) [1894] 3 Ch. 420.

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voice, musical instrument in the ordinary sense, such as a violin, piano, and so forth, or by any mechanical instrument. And seeing that mechanical instruments for producing musical sounds were well known at the date of the Act, I think the Legislature never contemplated that the author's right to multiply copies of published music would entitle him to stop the use in private of such an instrument because it performed the published music. Of course I am now speaking of mechanical musical instruments known at the date of the Act. But those instruments were numerous, and included, for instance, musical boxes. The Act, to my mind, never contemplated that the cylinder of a musical box, taking that as one of the best-known mechanical instruments, could be regarded as a copy of the printed music, even though an accomplished musician might be able, by inspection of the cylinder, to gather from it the notes of the music.

Now, in the case before us the sheets which are said to be copies of the plaintiffs' published sheets of music were issued only for the purpose of being used as parts of a mechanical musical instrument to produce musical sounds. And, as a matter of substance, the defendants' sheets have in fact only been used by those to whom they were issued for the sole purpose for which they were in fact issued. But it is said that they could be issued so as to answer the same purpose as copies of the plaintiffs' printed music, and that therefore they ought to be regarded as "copies" within the Act. To my mind it does not of necessity follow that, because a thing *might* be so used as to answer the same purpose as a copy of a book, it *must* be regarded as a "copy" within the Act.

But, passing that by, I deal with the question before us as one of substance, and I ask myself whether, in substance and in any practical view, the defendants' sheets could be used so as to answer the purpose of copies of the plaintiffs' musical sheets. On the evidence in the case I agree with my brother Stirling that this question must be answered in the negative; and I think that really disposes of the appeal. In no practical or substantial view, in my opinion, can the defendants' sheets be regarded as copies, within the meaning of the Act, of the

plaintiffs' sheets of music regarded as books. And I may add, at the risk of repeating what I have already said, that the plaintiffs' sheets and the defendants' sheets are issued and used for substantially different objects. The plaintiffs' sheets are issued and used as books to be read. The defendants' sheets are issued and used, not as books to be read, but as parts of a mechanical musical instrument to produce the sounds of music.

On the defendants' appeal, which raises a question of comparatively little practical importance, although I have felt some doubt about it, especially having regard to Stirling J.'s views, I come on the whole to the same conclusion as the Master of the Rolls. I think that no substantial part of the plaintiffs' book, that is, of their printed musical sheets, has been copied by the defendants. So far as words have been taken from the plaintiffs' book and put on the defendants' sheets, they have no use or connected meaning by themselves, and are only of use on the defendants' sheets, in any practical point of view, as directions for working the defendants' mechanical instrument to produce musical sounds.

I therefore agree in thinking that the plaintiffs' action ought to stand dismissed with costs here and below.

Solicitors: *Wilkinson, Howlett & Wilkinson; Maples, Teesdale & Co.*

G. I. F. C.

C. A.
1899
BYRNE J.
March 7.
C. A.
Nov. 27.

FARLOW *v.* STEVENSON.

[1898 F. 653.]

Landlord and Tenant—Covenant by Tenant to Pay and Discharge "all Taxes, Rates, Duties and Assessments payable in respect of the demised Premises" — Cost of Drainage Works required by Local Authority — Liability of Tenant—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *s.* 85—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 64, 96.

A tenant covenanted with his landlord that he would pay and discharge "all taxes, rates, duties and assessments whatsoever, which now are, or hereafter shall become, payable for or in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax":—

Held, that under this covenant the tenant was liable to pay the cost of drainage works, the execution of which was required by the local authority under s. 85 of the Metropolis Management Act, 1855.

Decision of Byrne J. affirmed.

Brett v. *Rogers*, [1897] 1 Q. B. 525, approved.

SUMMONS to determine whether, upon the true construction of a covenant contained in a lease of a messuage and premises granted by the plaintiffs to the defendant, the plaintiffs or the defendant were or was liable to pay the cost of drainage works done by the plaintiffs pursuant to notices from the vestry of the parish of Lambeth, dated respectively November 3 and November 12, 1897.

The lease was dated March 13, 1895, and was for the term of twenty-one years, determinable by the tenant at the end of the first seven or fourteen years, at the yearly rent of 125*l.*, to be paid clear of all deductions, except property tax.

The lease contained a covenant by the defendant with the plaintiffs to pay the rent clear of all deductions, except property tax, and also to "pay and discharge all taxes, rates, duties and assessments whatsoever, which now are, or hereafter shall become, payable for or in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax."

The notice of November 3 was served by the vestry upon

the premises. It purported to be given under s. 85 of the Metropolis Management Act, 1855, and s. 64 of the Metropolis Management Amendment Act, 1862. It was addressed "to the owner or occupier" of the premises. It stated that it appeared to the vestry, upon inspection of the drainage attached to the premises, that the drainage was in bad order and condition, and it continued: "The vestry hereby give you notice and require you within seven days after the service of this notice to reconstruct the drain in accordance with the regulations of the vestry."

The notice of November 12 was in the form of a letter signed by the medical officer of health of the vestry and addressed "to the owner" of the premises, calling his attention to the notice of November 3, and informing him that "unless the work is commenced within seven days, proceedings will in all probability be instituted against you."

By arrangement between the plaintiffs and the defendant the required works were carried out by the plaintiffs, without prejudice to the rights of either party. The cost of the works amounted to 143*l.*, and this summons was taken out to determine whether the plaintiffs or the defendant ought to pay that amount.

The summons was heard before Byrne J. on March 7, 1899.

Levett, Q.C., and *Gatey*, for the summons. "Duties and assessments" include the expense which has been incurred in replacing the drain as required by the vestry. The present case is covered by *Brett* v. *Rogers* (1), where all the authorities are reviewed. *Thompson* v. *Lapworth* (2); *Sweet* v. *Seager* (3); *Budd* v. *Marshall* (4), are all applicable to this case, and are in our favour.

Foà, contra, used the same arguments as are reported in the Court of Appeal, infra.

BYRNE J. In this case I think that the tenant is liable to pay. The repairs were done by virtue of notices given on

(1) [1897] 1 Q. B. 525.
(2) (1868) L. R. 3 C. P. 149.
(3) (1857) 2 C. B. (N.S.) 119.
(4) (1880) 5 C. P. D. 481.

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November 3 and November 12, 1897, by the vestry of the parish, requiring certain drainage to be reconstructed in accordance with the regulations of the vestry. The work has, in fact, been done and paid for, but it is without prejudice to the question between the parties. The question I have to determine is, who ought to bear that cost.

First of all I will take the lease in the case. The lease is for a term of twenty-one years, determinable at seven or fourteen years, from June 24, 1894, at the yearly rent of 125*l.*, such rent to be paid clear of all deductions except the property tax; the tenant by the said indenture covenanted with the plaintiffs, the landlords, to pay the rent, and that he would pay and discharge all taxes, rates, duties, and assessments whatever which then were, or thereafter should become, payable for or in respect of the said premises thereby demised, or any part thereof, whether parliamentary, parochial, or otherwise, except the landlord's property tax.

It is difficult to imagine larger words to be put into a covenant of this description for the purpose of protecting the landlord in getting his rent clear of all deductions. To my mind this is as large a form as one could well imagine. You might have had perhaps one other word—"payments"—"to pay all payments" might have been put in; but it is part of Mr. Foà's argument that the word "duties" means "payments."

A great many cases have been decided with reference to covenants of this description and with reference to particular Acts of Parliament. The Acts of Parliament that are applicable in the present case are the Metropolis Management Act of 1855, as altered by the Metropolis Management Amendment Act of 1862. Under the original Act the owner of the premises was made liable to pay liabilities of this kind, and then by clause 217 it was provided that "it shall be lawful for any vestry or district board to require the payment of any costs or expenses which the owner of any premises may be liable to pay under this Act from any person who then or at any time thereafter occupies such premises; and the owner shall allow every such occupier to deduct all sums of money which he so pays, or

which are levied by distress, out of the rent from time to time becoming due in respect of the said premises, as if the same had been actually paid to such owner as part of such rent." That was repealed by the Act of 1862, and under the Act of 1862, by s. 64, provision is made after reference to the provisions of the earlier statute for cases where parties ought to carry out the works ordered by the vestry. [His Lordship read the section, and continued:—] The argument founded upon that, as I understand it, is this—that up to this point the effect of that section is not to render an occupier liable for anything more than damages.

Then we turn to s. 96, and we find that provides that "the 217th, 218th, and 219th sections of the firstly recited Act are hereby repealed; and in lieu thereof be it enacted:" [Having read this section and the proviso, his Lordship continued:—] Now I think it is quite impossible to read the proviso at the end of that section without seeing that the Legislature contemplated that there might be a contract, making the tenant liable for that which the landlord was primarily and ultimately liable under the Act; and it uses words, with the exception of the word "dues" appearing there instead of the word "duties," almost corresponding with the words used in the present case, when referring to a contract which presumably it was deemed would affect that primary liability of the landlord. Of course I have to look at the exact bargain that was made between the parties.

Now, I am sure Mr. Foà will not consider that it is from any disrespect of his argument, which was extremely thorough, that I do not go through the cases that have been cited before me. In the first place it would take too long, and in the second place I think if I refer to two or three of them that will be quite sufficient. There were two leading authorities, one of *Thompson* v. *Lapworth* (1) and the other of *Tidswell* v. *Whitworth*. (2) In *Thompson* v. *Lapworth* (1) there was a covenant to pay and discharge all taxes, rates, duties, and assessments whatsoever, which during the continuance of that demise should be taxed, assessed or imposed on the tenant or landlord

(1) L. R. 3 C. P. 149. (2) (1867) L. R. 2 C. P. 326.

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of the premises thereby demised in respect thereof, whether parliamentary, parochial or otherwise, except property or income tax; and in that case it was held that the amount payable under the Metropolis Management Acts for paving, was a duty or assessment assessed or imposed upon the owner in respect of the premises within the covenant. In that case *Tidswell* v. *Whitworth* (1) was expressly referred to and distinguished; and the learned judge whose judgment has been chiefly referred to in the matter, Willes J., expressly refers to it, and distinguishes it from the case that was then before the Court.

I have been asked to say that *Tidswell* v. *Whitworth* (1) is applicable to the present case, and that *Thompson* v. *Lapworth* (2) is not; and I have been asked to say that *Sweet* v. *Seager* (3) is also a case not applicable to the present case. Now it is observable that *Sweet* v. *Seager* (3), though the words used in the covenant are different so far as the Acts of Parliament are concerned, is substantially the same as the present case, and I find that *Sweet* v. *Seager* (3) is a case which has been constantly recognised in the subsequent cases.

Now I come to a case of a much later date, namely, a case which has recently been before the Divisional Court, of *Brett* v. *Rogers*. (4) That is an authority binding upon me, and it is a case in which the learned judges have gone carefully through the cases, including *Thompson* v. *Lapworth* (2), *Tidswell* v. *Whitworth*. (1) There the covenant was—"to pay the land tax, sewers rate, and all other taxes, rates, duties, assessments and impositions, parliamentary, parochial or otherwise, which now are or shall at any time during this demise be assessed or imposed on or in respect of the said demised premises." Mr. Foà did not suggest that the statutory provisions in that case could be fairly distinguished from the statutory provisions in the present, and the learned judges in dealing with this covenant said: "We think that the obligation imposed upon the landlord to take up the defective drain and lay a new one was a duty imposed on her in respect of the

(1) L. R. 2 C. P. 326.
(2) L. R. 3 C. P. 149.
(3) 2 C. B. (N.S.) 119.
(4) [1897] 1 Q. B. 525, 528.

demised premises, and is within the words of the covenant." I cannot distinguish the covenant in that case from the covenant in the present case, except that the word "payable" is subsequently used. I cannot think there is any real distinction to be drawn between the two cases. I think that the view taken by the learned judges was that it was a case indistinguishable from *Payne* v. *Burridge* (1) and from *Sweet* v. *Seager* (2) in principle, and that in fact the tenant had by his covenant covenanted to indemnify the landlord against payments which the landlord would otherwise have to make in respect of duties in the sense of performable duties neglected, and in the sense of "duties" being payments which he had to make.

That being so, even if I thought this covenant did not apply in the present case, I do not see that I could draw any fair distinction between the present case and the case of *Brett* v. *Rogers* (3), and that I should be wire-drawing if I were to try to find any distinction between them which would avail the tenant in the present case.

I have used the word "indemnity," and I think it is only right to refer to it, as Mr. Foà has laid great stress upon this point. He says that we have in the present case no words of indemnity. It appears to me that, the rent having to be paid clear of all deductions, and that being followed by a covenant by the tenant to pay and discharge all taxes, rates, duties, and assessments whatsoever, payable for or in respect of the premises, with these very large words in it, it is in fact a covenant amounting to a covenant to indemnify the landlord against all the payments and duties mentioned which would otherwise have fallen upon him. It is not merely a covenant by the tenant to pay only the liabilities which the law casts upon him. As I have said, I have not gone through all the cases, but I have carefully followed Mr. Foà's argument founded upon them, and I think I have sufficiently referred to them to shew the grounds upon which I base my decision.

W. C. D.

(1) (1844) 12 M. & W. 727. (2) 2 C. B. (N.S.) 119.
(3) [1897] 1 Q. B. 525, 528.

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The defendant appealed. The appeal was heard on November 27, 1899.

Foà, for the defendant. The question is in substance, What is the meaning of the word "duties" in the lessee's covenant? The word "duty" may mean either (1.) the performance of an act in pursuance of an obligation, or (2.) a sum of money which is "due" to some public authority. In this covenant "duties" must have the second meaning: *Budd* v. *Marshall.* (1) Under such a covenant the tenant is not liable to pay a sum which the landlord has had to pay in consequence of a breach of a duty imposed on him by statute: *Tidswell* v. *Whitworth* (2); *Allum* v. *Dickinson* (3); *Arding* v. *Economic Printing and Publishing Co.* (4); *Rawlins* v. *Briggs.* (5) *Brett* v. *Rogers* (6) resembles to some extent the present case, but the decision does not bind this Court.

The covenant does not contain a word pointing to an indemnity of the lessor: such a construction would be a straining of the words in his favour. In most of the reported cases in which the word "duty" has been construed as meaning an act to be performed, the words of the covenant have differed from those used in the present case, or the circumstances have been special.

By s. 85 (7) of the Metropolis Management Act, 1855, the

(1) 5 C. P. D. 481.
(2) L. R. 2 C. P. 326.
(3) (1882) 9 Q. B. D. 632.
(4) (1898) 79 L. T. 420, 622.
(5) (1878) 3 C. P. D. 368.
(6) [1897] 1 Q. B. 525.
(7) Sect. 85: "If, upon such inspection as aforesaid, any drain, ... appear to be in bad order and condition, or to require cleansing, alteration, or amendment, or to be filled up, the vestry or board shall cause notice in writing to be given to the owner or occupier of the premises upon or in respect of which the inspection was made, requiring him forthwith, or within such reasonable time as shall be specified in such notice, to do the necessary works; and if such notice be not complied with by the person to whom it is given the vestry or board may, if they think fit, execute such works, and the expenses incurred by them in so doing shall be paid to them by the owner or occupier of the premises."

Sect. 64 of the Metropolis Management Amendment Act, 1862, after a recital of (inter alia) s. 85 of the Act of 1855, provides that:—

"In case of any such neglect or default by any person or persons to comply with the order of any vestry or district board to execute any works,

vestry are empowered to require drainage works to be executed, and, if they are not done, to execute them themselves, and to recover the cost from the owner or occupier of the premises. Sect. 64 of the Metropolis Management Amendment Act, 1862, amends s. 85, and in effect takes away the power to make the occupier pay the cost. The defendant has never been called upon by the vestry to pay.

This covenant means that the lessee shall bear all the impositions which he is directly liable to pay, though they are really to be borne by the lessor. The covenant merely takes away the right of the lessee to deduct the impositions which he has to pay from his rent. For instance, land tax is a landlord's tax; but by s. 17 of 38 Geo. 3, c. 5, the tenant is liable to pay it, and he is authorized when he has paid it to deduct it from his rent. The object of this covenant was to take away that right of deduction.

No direct liability for these drain expenses is imposed by the statutes upon the tenant; sect. 96 of the Act of 1862 is not sufficient to impose such a liability.

In *Tidswell* v. *Whitworth* (1) the covenant was nearly

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matters, or things under any of the said provisions, the person or persons so offending shall forfeit and pay to the vestry or district board a sum not exceeding five pounds, and also a further sum not exceeding forty shillings for every day during which such offence shall continue, to be recovered by action at law or before a justice of the peace in a summary manner, at the option of the vestry or district board; and the vestry or district board may at their discretion either execute or perform any such works, matters, or things, and recover the costs and expenses thereof from the owner of the property as aforesaid, or proceed for and recover the said penalty or penalties; but nothing herein contained shall render any person or persons liable to be proceeded against for the penalty as well as for the costs and expenses of the works."

By s. 96, "It shall be lawful for any vestry or district board, at their discretion, to require the payment of any costs or expenses which the owner of any premises may be liable to pay under the said recited Act" (the Act of 1855) "or this Act either from the owner or from any person who then or at any time thereafter occupies such premises, and such owner or occupier shall be liable to pay the same, and the same shall be recovered in manner authorized by the recited Act and this Act," and the owner is to allow the occupier to deduct what he so pays from his rent, but contracts between landlord and tenant are not to be affected.

(1) L. R. 2 C. P. 326.

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identical with that in the present case, except that the word "impositions" was used instead of "duties," and it was held that the tenant was not liable for the cost of sewering and paving.

In *Allum* v. *Dickinson* (1) the covenant contained the words "or payable by the tenant in respect of" the premises, and it was held that the tenant was not liable for expenses of paving under the Act of 1855, and that s. 96 of the Act of 1862 did not impose a liability on the tenant. The words "rates, taxes and assessments" apply to recurring charges, and "duties" should be construed in the same way.

In *Wilkinson* v. *Collyer* (2) also the tenant was held to be not liable for paving expenses, he having covenanted to pay "all rates, taxes and assessments payable in respect of the premises" during his term. In *Lyon* v. *Greenhow* (3), under a similar covenant, the tenant was held to be not liable for the cost of drainage works required by a local authority. In *Baylis* v. *Jiggens* (4) it was held that a tenant, who had covenanted to pay "all rates, taxes and assessments . . . . imposed or assessed upon the premises or the landlords or tenants in respect thereof," was not liable for paving expenses.

It is admitted that most of the cases in which the word "duties" has occurred in such a covenant by a tenant have been decided adversely to the tenant, but that was because the word was there and in the sense of "an act to be performed," in which sense, it is submitted, the word is not used here. But in *Tidswell* v. *Whitworth* (5) it was held that the tenant was not liable. There are two classes of covenants by a tenant —(1.) those in which all the words used relate to the payment of sums of money; (2.) those in which some of the words used relate to acts to be performed. The insertion of the words "imposed on the landlord" makes no difference. When a word of general import is used the doctrine of ejusdem generis does not apply: *Arding* v. *Economic Printing and Publishing Co.* (6)

(1) 9 Q. B. D. 632.
(2) (1884) 13 Q. B. D. 1.
(3) (1892) 8 Times L. R. 457.
(4) [1898] 2 Q. B. 315.
(5) L. R. 2 C. P. 326.
(6) 79 L. T. 420, 622.

In the absence of express words making the tenant liable for that for which the landlord is legally liable, such a covenant does not render the tenant liable for a permanent improvement of the premises.

[ROMER L.J. Why should the words "in respect of the premises" be limited? See *Thompson* v. *Lapworth*. (1)]

In that case the covenant was to pay all duties and assessments "assessed or imposed on the tenant or landlord of the premises demised in respect thereof." In *Hill* v. *Edward* (2) a tenant who had covenanted to pay all "assessments, impositions, and outgoings" "charged or imposed on or in respect of the premises," was held not liable to pay the expenses of sewering, levelling, and paving under s. 150 of the Public Health Act, 1875.

[LINDLEY M.R. referred to *Budd* v. *Marshall*. (3)]

The words used there were very different from those used in the present case.

In *Payne* v. *Burridge* (4) the tenant was directly liable to make the payment though he could deduct it from his rent. The words "on the tenant or the landlord" are not in the present covenant.

Rawlins v. *Briggs* (5) is very like the present case, and it was decided in favour of the tenant.

In *Hartley* v. *Hudson* (6) the covenant was to pay all assessments charged upon the premises, "or upon any person or persons in respect thereof." The statutory provisions in cases of this nature are of two kinds—(1.) those in which the local authority is empowered to do the work and charge the owner with the cost of it; (2.) those which direct that the owner shall do it, and empower the local authority to do it only if he makes default. Sect. 105 of the Act of 1855 is an instance of the first class. In the second class the payment which the owner has to make if he fails to do the work is in the nature of a penalty for breach of duty. It is not a payment "in respect of the premises."

(1) L. R. 3 C. P. 149.
(2) (1885) 1 Cab. & E. 481.
(3) 5 C. P. D. 481.
(4) 12 M. & W. 727.
(5) 3 C. P. D. 368.
(6) (1879) 4 C. P. D. 367.

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The present case is really governed by *Tidswell* v. *Whitworth*. (1) That decision was approved by the Court of Appeal in *Midgley* v. *Coppock*. (2) If a covenantor undertakes to perform acts it is immaterial whether the duty is imposed on the landlord or the tenant: *Sweet* v. *Seager* (3); but that is not so when the covenant is simply to pay. In that case the words used were much more comprehensive than the words used here. If *Brett* v. *Rogers* (4) is adverse to the appellant it is not binding on this Court, and it is submitted that it was wrongly decided. The Divisional Court there said that the case was not distinguishable from *Payne* v. *Burridge*. (5) It is submitted that the two cases are quite distinguishable.

Levett, Q.C., and *Gatey*, for the plaintiffs, were not called upon.

LINDLEY M.R. If any one could have persuaded us that the decision of Byrne J. was wrong, Mr. Foà would have done so by his extremely able and lucid argument. But we must come back to the facts and to the provisions of the Acts with which we have to deal. [His Lordship read the covenant in the lease, and continued:—]

I cannot imagine wider words than these. We do not always find a covenant of this kind expressed in such language. There is not in it the word "impositions," nor one or two other words which are found in the old forms; but, taking the language which is used, "All rates, taxes, duties and assessments whatsoever payable for and in respect of the premises, except the landlord's property tax," I do not see how it is possible to use larger language.

During the tenancy the drains of the premises were in bad order, owing to structural defects, and not owing to the tenant's negligence in repairing, and then notices were served on November 3 and 12 by the vestry, stating that the drains were in bad order, and requiring that they should be reconstructed according to the regulations of the vestry. By arrangement

(1) L. R. 2 C. P. 326.
(2) (1879) 4 Ex. D. 309.
(3) 2 C. B. (N.S.) 119.
(4) [1897] 1 Q. B. 525.
(5) 12 M. & W. 727.

between the landlord and the tenant the work was done by the former, and the question now is, who is to bear the expense of doing it.

Now, the power of the vestry to require the drains to be put in order, and, if not done, to do the work themselves and recover the cost from the owner or occupier, is conferred by s. 85 of the Metropolis Management Act, 1855, as modified by the Metropolis Management Act, 1862. We have been asked to say that s. 85 of the first Act has been repealed by s. 64 of the second Act. It has, no doubt, been modified; but I cannot say it has been repealed. Sect. 85 is that which authorizes the vestry to give notice to the owner or occupier of premises requiring drains which are out of order to be put right. Other parts of that section are, no doubt, modified by s. 64 of the later Act; but, when you look at the various sections, it is impossible, I think, not to come to the conclusion that a duty is cast by the Acts upon the owner or occupier (I do not care which for the moment) to put the drains in order on receiving a proper notice from the vestry, and a duty is also cast on the vestry to compel the owner or occupier (I do not say which for the moment) to pay the expense. I agree with Mr. Foà in his very able argument that, having regard to the language used here, "will pay and discharge all duties payable," the word "duties" means sums payable pursuant to some duty imposed by Act of Parliament. The sum which is payable here seems to me to be a "duty payable," in the sense of a sum of money payable in respect of a duty. Mr. Foà wants us to insert the words, "payable by the owner"; in other words, he wants us to say that the only sums payable by the tenant are sums payable in respect of duties other than those imposed upon him peremptorily. Does the language admit of that construction? Looking at the language apart from the authorities, I venture to say it does nothing of the sort. The language is perfectly general: it does not say by whom payable: it does not cut down the meaning of the word "payable." The words are, "become payable for or in respect of the premises." Then there is a very notable exception, "except the landlord's property tax," which, so far as it goes, throws light upon the

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general expression. It excludes, to my mind, or tends to exclude, the narrow construction which we are asked by Mr. Foà to put upon the words.

Mr. Foà has contended that the present case is covered by the decision in *Tidswell* v. *Whitworth* (1), and, if the language used here had not been wider than the language used in that case, it would have caused considerable difficulty. But the language used here is wider, and if we look at the cases decided since *Tidswell* v. *Whitworth* (1) we cannot help seeing that the language used in the present case is such as to take it out of *Tidswell* v. *Whitworth*. (1) It seems to me that if we did not take this view we should be introducing difficulty and confusion as to the cases which have been cited. In every case in which the word "duties" has been introduced into such a covenant the construction has been against the tenant and in favour of the landlord. Mr. Foà is justified in saying that in almost all those cases a money payment was imposed upon the landlord. But if you look at the decisions, especially *Brett* v. *Rogers* (2), which, I think, was rightly decided, it is plain enough that in the covenants you find the word "duty." I think the decision of Byrne J. was right, and we should be splitting hairs if we differed from him. In my opinion, this appeal should be dismissed.

SIR F. H. JEUNE. I am of the same opinion. The learned judge based his decision on *Brett* v. *Rogers*. (2) Mr. Foà has very fairly challenged that case, and I do not think he could have taken any other course. It appears to me that in *Brett* v. *Rogers* (2) the very ground was traversed which he has sought to traverse now. In *Brett* v. *Rogers* (2) *Tidswell* v. *Whitworth* (1) was referred to, and the peculiarity of that case was pointed out, and the answer given (and I think the true answer) was, that if the covenant there had contained the word "duties" it would have been inconsistent with the reasoning of the judgment. That, as it appears to me, sums up the whole matter. In the present case I think the parties have deliberately and of set purpose enlarged the words of the cove-

(1) L. R. 2 C. P. 326. (2) [1897] 1 Q. B. 525.

nant for the express purpose of avoiding the ratio decidendi of *Tidswell* v. *Whitworth*. (1) If you regard the word "duties" as enlarging the covenant, and including sums payable in respect of a duty, it appears to me that those who drew the covenant have shewn that they knew what they were about in avoiding the effect of the decision in *Tidswell* v. *Whitworth*. (1) In my opinion, *Brett* v. *Rogers* (2) was rightly decided, and the judgment of Byrne J. was right and should be affirmed.

ROMER L.J. This covenant is peculiarly worded. The numerous cases relating to covenants of this class are not easily reconciled, and give rise to fine distinctions. In this state of the authorities I feel myself at liberty to construe the covenant in accordance with what appears to me to be its true meaning. The covenant, I think, is not limited to "taxes, rates, duties and assessments payable by the tenant in respect of the premises"; but it is general, and includes taxes, rates, duties and assessments payable by either landlord or tenant in respect of the premises. Further, I think that in this covenant the word "duties" covers the payment now in question. I agree in thinking that the decision of Byrne J. was right and ought to be affirmed.

Solicitors: *Rundle & Hobrow; Farlow & Fuller.*

(1) L. R. 2 C. P. 326. (2) [1897] 1 Q. B. 525.

W. L. C.

C. A.
1899
NORTH J.
Nov. 17.
C. A.
Dec. 6.

DE BRAAM *v.* FORD.

[1899 D. 1910.]

Bill of Sale—Validity—Deviation from Statutory Form—"Stipulated Time of Payment"—Covenant to Pay "on or before" a Named Day—Bills of Sale Act, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By a bill of sale, given as security for money, the grantor agreed to pay the principal "on or before" November 1:—

Held, that this amounted to an agreement to pay on a fixed day, with a provision for the defeasance of the security (at the option of the grantor) on payment at an earlier date, and that the bill of sale was, therefore, "in accordance with" the form given in the schedule to the Bills of Sale Act, 1882, and was valid.

Decision of North J. reversed.

The provision in the statutory form that there must be a "stipulated" time of payment means that the time at which payment is to become obligatory upon the grantor must be fixed.

ACTION to set aside a bill of sale, given as security for money, on the ground (inter alia) that it was not in accordance with the form given in the schedule to the Bills of Sale Act, 1882, and was therefore void under s. 9 of the Act, and to restrain the grantee from taking possession of the goods comprised in the deed.

The bill of sale was dated November 1, 1898. By it, in consideration of 1500*l.* then paid to the grantors by the grantee, the grantors thereby assigned unto the grantee, his executors, administrators, and assigns, the chattels and things specifically described in the schedule thereto annexed, "by way of security for the payment of the sum of 1500*l.* and interest thereon at the rate of 20*l.* per cent. per annum." And the grantors did thereby agree and declare that they would duly pay to the grantee the principal sum aforesaid "on or before the 1st day of November, 1899, and will in the meantime, and so long after the last-mentioned day as the principal sum or any part remains unpaid, pay interest thereon, or on such part remaining unpaid, at the rate aforesaid, by equal consecutive quarterly payments

computed from the date of these presents, namely, on the 1st February, the 1st May, the 1st August, and the 1st November in each year, the first of such quarterly payments to be made on the 1st February, 1899. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by [the grantee] for any cause other than those specified in section 7 of the Bills of Sale Act (1878) Amendment Act, 1882."

The plaintiffs moved for an interlocutory injunction before North J. on November 17, 1899.

Hon. E. C. Macnaghten, Q.C., and *Stewart-Smith*, for the plaintiffs, in addition to the cases cited infra in the Court of Appeal, referred to *Sibley* v. *Higgs*. (1)

Herbert Reed, Q.C., and *Thorn Drury*, for the defendant, referred to the same cases as were cited infra in the Court of Appeal.

NORTH J. held that the bill of sale was void as not being "in accordance with" the statutory form, because there was not in it a definite statement of the time of payment as required by the statutory form. The Legislature had thought fit to enact that, unless the time of payment was certain, the bill of sale should be void, and it did not matter in whose favour the uncertainty was. In the present case it was impossible for the grantee to say what the time of payment would be, and the instrument was therefore void.

The point was a strictly technical one, and in his Lordship's opinion the case was governed by *Hughes* v. *Little*. (2)

His Lordship accordingly granted an interlocutory injunction as asked by the plaintiffs.

The defendant appealed. The appeal was heard on December 6, 1899.

Herbert Reed, Q.C., and *Thorn Drury*, for the defendant. The bill of sale is "in accordance with" the form given in the

(1) (1885) 15 Q. B. D. 619. (2) (1886) 18 Q. B. D. 32, 36, 37.

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schedule to the Act of 1882 (1); there is no substantial variation. November 1 is the time "stipulated" for payment, though the grantee is bound to receive the money sooner, if the grantor desires to pay it sooner. The grantor is not obliged to pay it until November 1, though he has an option of paying it sooner.

[LINDLEY M.R. referred to *Simmons* v. *Woodward*. (2)]

A bill of sale must be construed in the same way as any other document, and, when it has been properly construed, it must be ascertained whether it is "in accordance with" the statutory form.

[ROMER L.J. If there were a covenant to pay the money on a specified day, followed by an option to the grantor to pay it sooner, would that be "in accordance with" the statutory form?]

It would. There would be a stipulated time for payment, with an added provision for the defeasance of the security if the money was paid sooner. Till November 1 no rights under this bill of sale accrue to the grantee. *Hughes* v. *Little* (3) is distinguishable from the present case.

[ROMER L.J. What is the meaning of the covenant for the payment of interest? Suppose the principal were paid off a month after the execution of the deed: must interest be paid for a quarter of a year?]

The grantor would have to pay interest only so long as the security was outstanding. The covenant is governed by the words "in the meantime." On the ordinary principles of redemption interest would be payable only so long as any part of the principal was outstanding.

(1) By s. 9 of the Act, "A bill of sale made or given by way of security for the payment of money by the grantor thereof shall be void unless made in accordance with the form in the schedule to this Act annexed."

The form given in the schedule contains (inter alia) the following clauses: "And the said *A.B.* doth further agree and declare that he will duly pay to the said *C.D.* the principal sum aforesaid, together with the interest then due, by equal ——— payments of £——— on the ——— day of ——— [*or whatever else may be the stipulated times or time of payment*]. And the said *A.B.* doth also agree with the said *C.D.* that he will [*here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security*]."

(2) [1892] A. C. 100.

(3) 18 Q. B. D. 32.

[Romer L.J. Has it ever been held that a variation from the statutory form which is in favour of the grantor makes the bill of sale void?]

In *In re Coton* (1) it was held that a provision in ease of the grantor of a bill of sale, though it deviated from the statutory form, did not render the bill void. At any rate, it is submitted that the Court should not upon an interlocutory motion decide such an important point against the grantee, but should require the grantor to pay the money into court: *Hill* v. *Kirkwood*. (2)

Hon. E. C. Macnaghten, Q.C., and *Stewart-Smith*, for the plaintiffs. This bill of sale is not "in accordance with" the statutory form. The Act says nothing about the person in whose favour a variation from the form is made; any material variation makes the bill of sale void. The preamble to the Bills of Sale Act, 1854, applies to the subsequent Acts, and it shews that the policy of the Acts is not to protect debtors from grasping creditors, but to prevent debtors from keeping up false appearances. An essential part of the statutory form is a fixed day for payment of the debt. Here practically the grantee is bound to receive the money at an uncertain time, and the time of payment is therefore uncertain. If a bill of sale provides that the money shall be paid on demand by the grantee, that is clearly bad: *Hetherington* v. *Groome*. (3) In such a case an option is given to the grantee. Why should not a bill of sale be equally void if an option as to the time of payment is given to the grantor? It cannot make any difference whether the time of payment is to be chosen by the grantee or by the grantor; in neither case is there a fixed time for payment. It is not enough that a day for payment is fixed if it can be altered at the will of either party. A perpetual mortgage with an option to the grantor to redeem it when he pleased would be bad. In principle the present case is equivalent to that. *Hughes* v. *Little* (4) shews that a bill of sale cannot be made redeemable on the happening of a contingency.

(1) (1887) 4 Morrell, 90.
(2) (1880) 28 W. R. 358.
(3) (1884) 13 Q. B. D. 789.
(4) 18 Q. B. D. 32.

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[LINDLEY M.R. *Ex parte Stanford* (1) shews that a bill of sale is "in accordance with" the statutory form, if its legal effect is the same as that of the form.]

But that case also shews that the Act is aimed at form as well as at substance.

[ROMER L.J. If a bill of sale contained a covenant to pay on a fixed day, might there not be added a defeasance on payment at an earlier date? Is not that in substance the effect of this bill of sale?]

A defeasance would not affect the main provision that there must be a definite time for payment.

[LINDLEY M.R. Does not that mean that there must be a fixed time at which payment by the grantor is to become obligatory?]

And when the receipt of the money by the grantee is to become obligatory. If it is open to either party to alter the day of payment, the statutory form (which requires a fixed time for payment) is not complied with. It might perhaps have been held that a provision for payment on demand would satisfy the statutory form; but the Court has decided otherwise. The time of payment is the time when, by the arrangement between the parties, the money is to become payable. Here the principal might be paid off within a week after the execution of the deed, and yet the payment of the interest could not be enforced till the end of three months.

LINDLEY M.R. This is a case in which opinions are likely to differ, and we have to do that which we very seldom have to do, namely, to attend to form and not to substance. [His Lordship read s. 9 of the Act and referred to the form given in the schedule, and continued:—] This bill of sale is not in that form, that is plain enough; and the question is whether it is "in accordance with" the form. That is the old difficulty which has puzzled the Courts ever since this section came before them—what is meant by "in accordance with" the form? I hardly know what to say about it; every departure from the statutory form does not make a bill of sale void, and it is extremely difficult to draw the line. I can only take

(1) (1886) 17 Q. B. D. 259, 274.

refuge in what Lord Macnaghten said in the House of Lords in *Thomas* v. *Kelly* (1): "When is an instrument which purports to be a bill of sale not in accordance with the statutory form? Possibly when it departs from the statutory form in anything which is not merely a matter of verbal difference. Certainly I should say when it departs from the statutory form in anything which is a characteristic of that form."

Now, what is "a characteristic of that form"? One of the characteristics, I think, is this—a fixed and certain day of payment. That results from these words in the scheduled form: That the borrower (the grantor of the bill of sale) "doth further agree and declare that he will duly pay to" (the lender) "the principal sum aforesaid, together with the interest then due, by equal ——— payments of £ ——— on the ——— day of ——— [or whatever else may be the stipulated times or time of payment]." And then it proceeds: "And the said" (borrower) "doth also agree with the" (lender) "that he will [here insert terms as to insurance, payment of rent, or otherwise, which the parties may agree to for the maintenance or defeasance of the security]." I will say something about the latter clause presently; but obviously a certain time of payment is a "characteristic" of the form, and that must be found in the bill of sale.

Now, what is the meaning of the "time of payment"? To my mind the expression is unambiguous: it means the time at which payment is to become obligatory—the time at which the borrower must pay, and after which, if he does not pay, he can be sued for payment. The time at which the obligation to pay is to arise must be definitely stated in the bill of sale. That, as it appears to me, is the characteristic of the form as regards the time of payment. In that view it has been decided, and, in my opinion, very properly, upon the construction of this section, that, if the time at which payment is to become obligatory is not distinctly stated in the bill of sale, the bill of sale is not "in accordance with" the form, and therefore an agreement to pay on demand, or on the happening of an uncertain event, e.g., to pay a sum for which the grantee may

(1) (1888) 13 App. Cas. 506, 520.

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become liable under a guarantee, all of which are perfectly businesslike arrangements, cannot be carried out by a bill of sale.

We are now asked to stretch that principle further, and to say that, though the time of payment, in the sense which I have mentioned, is fixed, a bill of sale is not "in accordance with" the form, and is void, because the borrower stipulates that he may make the payment sooner. That appears to me to be a rather startling proposition. It is startling because we are so in the habit of striving to get at the substance of a thing rather than at the form, that we must be careful not to be misled by that habit, which, though it is good in ninety-nine cases out of a hundred, is bad as regards cases under s. 9 of this Act.

Let us look at the matter a little more closely. Suppose there was a covenant to pay, as here, on November 1, with interest on certain days, and then there was a proviso that it should be lawful for the borrower to redeem before that date on payment of principal and interest: that would be in perfect accordance with the form. Expanded in that way, it would be covered by these words in the schedule: "Here insert terms, which the parties may agree to for the maintenance or defeasance of the security"—that is, either to maintain it or put an end to it: it would be perfectly unobjectionable in that form.

We are reduced then to this—Are we to say that, because this bill of sale is not *in* that form it is not "in accordance with" it? I cannot go to that extent. I think that would be too fine a splitting of hairs, and even when we are driven to regard form and not substance, as we are here, we should be going a stage beyond the requirements of the Act. With great deference to the learned judge, it seems to me that he has lost sight of the fact that the "time of payment" in the form means the time at which the obligation of the grantor to pay is to be fixed. That is fixed here, and I think this bill of sale is "in accordance with" the statutory form. The order must be discharged, and the appeal be allowed. As regards costs, we understand that there are other matters behind, and therefore the costs will be made costs in the action.

SIR F. H. JEUNE. It is obvious that two views may be taken of this section, and two views were in fact taken of it at a very early time. The bill of sale must be not in, but "in accordance with" the form. In one view it may be said that means that some latitude is given—that you are not bound to follow slavishly the actual words of the form, but are at liberty to use other language, not exactly that of the form, if it does not depart from the form "in a manner calculated to mislead those whom it is the object of the statute to protect." On the other hand, a narrower view may be taken, and such a view was taken by Fry L.J. in *Ex parte Stanford*. (1) But when I read the two judgments delivered in that case, the one that of the whole Court except Fry L.J., namely, Lord Esher M.R., Cotton, Lindley, Bowen, and Lopes L.JJ., and contrast their view with that of Fry L.J., I am bound to say that the view expressed by the majority, consisting of judges of such extraordinarily large and varied experience, commends itself to my mind rather than the narrower view, though expressed by a judge of such competence and care as Fry L.J.

Taking then the judgment of the majority of that Court, we find that emphasis is laid on the fact that the bill of sale is only to be "in accordance with" the form, and not *in* the form, and Bowen L.J., who delivered the judgment of the majority, said (2): "A bill of sale is surely in accordance with the prescribed form if it is substantially in accordance with it, if it does not depart from the prescribed form in any material respect. But a divergence only becomes substantial or material when it is calculated to give the bill of sale a legal consequence or effect either greater or smaller than that which would attach to it if drawn in the form which has been sanctioned, or if it departs from the form in a manner calculated to mislead those whom it is the object of the statute to protect."

In the present case it is admitted that the intention and effect of the words used are to impose in the first instance on the grantor an obligation to pay on a given day, November 1, but to give him an option, with all its consequences in the way of defeasance, to pay the money at an earlier date.

(1) 17 Q. B. D. 259. (2) 17 Q. B. D. 270.

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Is that in substance a variation from the provision which appears in the form in brackets, "or whatever else may be the stipulated times or time of payment"? I agree that from those words you gather that there must be a stipulated time for payment. Accordingly, it has been held, and I have no doubt rightly, that when the time of payment in any sense of the words is at large and left uncertain, when for instance it is to be on the demand of the grantee, so that the grantor can be compelled at the option of the grantee at any time—an uncertain time—to pay the money, that violates the spirit of the form, because the language of the form provides that the grantor is bound to pay at a stipulated time. "Time of payment" does not in my opinion mean the time at which the obligation can be got rid of and the grantee is bound to accept the money, but it means the time at which the grantor is bound to pay. I do not see why we should not give that narrow meaning to the words when we are bound to look strictly at the exact form of the bill of sale. If that be so, the stipulation in this bill of sale is not at variance in substance with the form prescribed in the schedule.

But the matter may be put in another way; I think it is only putting it in another way, but it helps me to get at the substance of the bill of sale. It is to be observed that when you come to the terms of defeasance the scheduled form ceases to be as peremptory as it was with regard to other matters; it leaves the terms of defeasance, both as to substance and language, at the option of the parties; it does not prescribe what the terms of defeasance shall be, still less the language in which they shall be couched. If, therefore, everything which departs, or which can be supposed to depart, from the earlier and stricter terms of the form could be embodied in a defeasance clause, it appears to me that is only another way of saying that the substance of what you wish to do can be done without infringing or varying in any material way the terms prescribed in the schedule. That is really what is done in the present case. It would be easy to draw the bill of sale, following the earlier words as to the "stipulated time of payment," and making the stipulated time of payment November 1, and then

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to add a proviso having the effect of a clause for defeasance giving the substance of what was the intention of the parties. You would not be departing from the substance of the scheduled form, because you would be only giving a latitude to the parties in that in which the form has intended that they should have a latitude. The form provides not only for the payment of the principal sum aforesaid, but goes on, "together with the interest then due." So that in substance and in form it must be provided that when the principal sum is payable interest up to that time is also to be paid. In the present case there are not the words, "together with the interest then due"; but, though the interest clause is not so clear as I should like to see it, the effect of it, I think, is this—that at any time when the money is paid off, whether it be at the stipulated time, November 1, or at an earlier time, arising from the exercise of the option by the grantor, the interest must be paid up to the time of that payment.

If that, as I have no doubt, is the true construction of the bill of sale, it follows in effect the form given in the schedule to the Act.

ROMER L.J. I agree, and I need only add this, with reference to the form in the schedule to the Act, that I assent to the view that you cannot, under the guise of a proviso as to the defeasance of the security, insert a provision which would be inconsistent with the prior terms of the form. You can only insert such a provision as to defeasance as will leave the prior part of the form practically unaffected. If the true construction of the deed now before us be, as I think it is, that which has been stated by the Master of the Rolls and the President, there is no such inconsistency in the proviso which one gathers from this deed—that the grantor shall be at liberty to pay off the principal money, with interest up to date, before November 1, 1899, the date fixed in the deed, and that thereupon the security shall come to an end. There is nothing in that inconsistent with the earlier part of the scheduled form.

Solicitors: *Emery Davies; G. J. Fowler.*

W. L. C.

NORTH J.
1899
Nov. 21, 22.

WILLIAMS *v.* WILLIAMS.

[1898 W. 501.]

In re HARTLEY.
WILLIAMS *v.* JONES.

[1898 H. 2521.]

Limitations, Statute of—Charge on Land—Term of Years—Express Trust—Two Sums secured by One Term—Power of Trustees, entitled to raise One Sum, to raise the other also—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10—*Power of Appointment—Exercise by Residuary Bequest in Will — Assets — Administration — Order in which Funds applied in Payment of Debts—Wills Act*, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 27.

A conveyance of land to trustees for a term of years upon trust to raise specific sums of money is an express trust within s. 10 of the Real Property Limitation Act, 1874.

Where land is conveyed to trustees for a term of years upon trust to raise two sums of money, and it is held, in an action brought to recover both sums, that they are entitled to enter and raise one of these sums, but that the other is barred by the Real Property Limitation Act, 1874, the right to raise the second sum is not preserved by the success of the action in respect of the first sum.

Where a power of appointment is exercised by a general bequest in a will the property appointed is included in and passes by the bequest according to the terms of the will, and not as if a separate execution of the power were read into the will. The property is therefore not necessarily postponed, as a fund liable for payment of his debts, to other assets of the testator.

SUMMONS AND FURTHER CONSIDERATION.

By a settlement made in 1838 the Llwyn estate was conveyed to trustees for a term of 500 years upon trust to raise the sum of 2000*l.* as soon as conveniently might be after the decease of Anne Hartley, with interest at the rate of 4*l.* 10*s.* per cent. from her death, and a like sum of 2000*l.* as soon as conveniently might be after the decease of Griffith Williams, and to stand possessed of these sums upon trust as to the first 2000*l.* for such persons and generally in such manner as Anne Hartley by deed or will should appoint, and in default of such appointment upon trust for her executors, administrators and assigns absolutely; and as to the second 2000*l.* upon trust

for all the children of Griffith Williams and Mary his wife who attained twenty-one, or being daughters were previously married.

Anne Hartley did not exercise the power of appointment, and, in the events which happened, she became owner in fee of one undivided half of the estate. She died on February 24, 1886, and the first-named 2000*l.* thereupon became raisable. Griffith Williams died in 1860, and on his death the second 2000*l.* became raisable, but neither of these sums was raised.

On January 15, 1898, an action of *In re Hartley, Williams* v. *Jones*, for the administration of the estate of Anne Hartley, was commenced, and on February 15, 1898, the writ in the action of *Williams* v. *Williams*, asking for an order that the two sums of 2000*l.* might be raised, was issued by Meyrick Meredith Williams, a son of Griffith and Mary Williams, and administrator with the will annexed of Anne Hartley. It was admitted that, inasmuch as the action of *Williams* v. *Williams* was brought within twelve years from the death of Anne Hartley, the first 2000*l.* was raisable if the action was properly constituted. His Lordship held that it was sufficient for that purpose, and it was then contended that the second 2000*l.* was barred by the operation of the Real Property Limitation Act, 1874.

Theobald, Q.C., and *A. R. Ingpen*, for the plaintiff. The question whether the second sum of 2000*l.* is still raisable depends on the Real Property Limitation Act, 1874. In the first place, the plaintiff contends that this charge is not within the Act at all. Under the old law this trust would not have been affected by the Statute of Limitations, and as long as there was anything to be done under the term the trustees could have entered to enforce their rights: *Cox* v. *Dolman* (1); *Lawton* v. *Ford* (2); *Hughes* v. *Coles*. (3) Then the Act of 1874, which reduced to twelve years the time during which an action might be brought, provided by s. 10 that the time for recovering money charged on land should not be enlarged by

(1) (1852) 2 D. M. & G. 592. (2) (1866) L. R. 2 Eq. 97.
(3) (1884) 27 Ch. D. 231.

NORTH J. express trusts. That left other trusts as they were. A grant of a term to trustees is not an express trust. In order to come within the section the fee must be given to the trustees upon trust to raise the money charged.

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HARTLEY, *In re.* WILLIAMS v. JONES.

Secondly, the trustees are entitled to enter and take possession for the purpose of raising the first 2000*l.*, and that is enough to exclude the operation of the statute. They are in equity in possession, and it is their right and their duty to carry out the whole trust.

[NORTH J. The trustees only enter for the purposes of the subsisting trusts.]

The trust to raise the second 2000*l.* is a subsisting trust. The Act does not bar the right; it bars the remedy. The remedy of the trustees would be an action for possession, and if they are already entitled to possession in respect of the same trust no further action is necessary.

J. G. Wood, for Margaret Jones, formerly Margaret Williams, a daughter of Griffith Williams.

Arnold Herbert, for Laura Anne Williams, another daughter of Griffith Williams.

Dibdin, for the trustees of the term.

Hon. E. C. Macnaghten, Q.C., and *Cann*, for the owner of the other moiety of the estate. The plaintiff has lost his right to have the second 2000*l.* raised out of the estate. It is money charged on land and secured by an express trust within s. 10 of the Real Property Limitation Act, 1874. That section refers to s. 25 of the Real Property Limitation Act, 1833, and places express trusts on the same footing as other charges on land. In *Cox* v. *Dolman* (1) the money was secured by a trust of a term, and that was held to be an express trust.

The existence of the action is not enough to negative the defence of the statute. The trustees are not in possession, and the two sums of 2000*l.* are quite distinct.

Theobald, Q.C., in reply.

NORTH J. I think that the statute is a bar as regards the second 2000*l.* The 10th section of the Act says: "After

(1) 2 D. M. & G. 592.

the commencement of this Act no action, suit, or other proceeding shall be brought to recover any sum of money or legacy charged upon or payable out of any land or rent, at law or in equity, and secured by an express trust, etc." There seems to me to be a phrase introduced there for the purpose of altering the law as it is shewn to have existed previously to this statute by the cases which have been referred to; therefore this is a case in which the right to bring an action to recover this 2000*l.* is expressly prohibited, and, that being so, the only point remaining is whether, as the action was properly commenced in respect of the first 2000*l.*, that mere fact authorizes me to treat the action as sufficient to make the second 2000*l.* raisable, although if the first sum had not been recovered the action could not have been brought now for the second. I do not think it does. I think I must look at the substance of the matter. The action is to recover two separate sums of 2000*l.* each. Suppose that two separate actions had been brought. Could it be said that if an action had been brought to recover one 2000*l.*, and had succeeded, another action by the same plaintiff but suing in a different character to raise the other 2000*l.* would not fail under the statute? If the actions had been originally divided in that way, as they might have been, the second action would without doubt have failed; and I do not think it can succeed because it is coupled with the suit to recover the first 2000*l.* The right of the trustees to enter and take possession and raise the money only extends to raising money which is lawfully raisable and payable, and I do not think that this money is lawfully raisable and payable, although it is secured on land by express trust, having regard to the fact that it became raisable nine-and-twenty years ago, and nothing has been raised or paid on account of it since that time.

A question was also raised on further consideration, in *In re Hartley, Williams* v. *Jones*, on the construction of Anne Hartley's will, whether she must be taken to have exercised her power of appointment by a gift of residue, and whether the effect of that appointment was to make the 2000*l.* liable

NORTH J. 1899 WILLIAMS v. WILLIAMS. HARTLEY, *In re.* WILLIAMS v. JONES.

for payment of her debts and legacies only after exhausting her other assets. She made her will in 1868, and thereby devised all her real estate to trustees for the term of 1000 years upon trust to "raise such sum or sums of money as shall be required in aid of my personal estate for payment of my debts, legacies, funeral and testamentary expenses, and . . . . apply the money so to be raised accordingly." The will contained no further direction for payment of debts, and the testatrix devised her real estate subject to the term to uses under which the plaintiff was now tenant for life, gave some legacies, and bequeathed "the residue of my personal estate unto the said Meyrick Meredith Williams, Margaret Williams, and Laura Anne Williams."

Anne Hartley's debts amounted to 1918*l.*, and the legacies bequeathed by her will to 4421*l.* Her personal estate including the 2000*l.* was insufficient to meet these claims.

Theobald, Q.C., and *A. R. Ingpen*, for the plaintiff. Under s. 27 of the Wills Act the gift of residue contained in the will operates as an execution of the power of appointment. The circumstance that the 2000*l.* belonged to the testatrix in default of appointment and would pass under the gift of residue is immaterial; the section says that a general bequest "shall operate" in this manner. A gift of residue is a general bequest; no contrary intention is shewn; and the result is that the 2000*l.* has been appointed, and has become part of her assets in that way, and is only applicable in payment of debts and legacies after the trusts of the term are exhausted: Jarman on Wills, 5th ed. vol. ii. p. 1430.

[NORTH J. I think the power is executed, but the 2000*l.* must bear its burden according to the true construction of the words of the will. The testatrix has made it part of the residue, and it cannot be treated as part of the residue except on the terms of the will. The Act does not say you are to read an appointment into the will; it only explains that the property is to be included in the general bequest.]

The word "include" does not make the property appointed and the residue one fund. They are two distinct funds and

have to be applied in different ways. There is no reason why pecuniary legacies should be paid out of the appointed fund, which is itself a specific legacy.

J. G. Wood, for Margaret Jones, referred to in the will as Margaret Williams. It is clear from the will which directs money to be raised under the trusts of the term in aid of her personal estate that the testatrix did not intend to include in her personal estate for payment of debts and legacies money over which she had merely a power of appointment, but in which she had no property.

The effect of the statute is to insert in the will an appointment of the 2000*l.* to the residuary legatees, and the debts and legacies must be paid, first, out of the personal estate; secondly, out of the term; and, lastly, out of the appointed fund. The testatrix has herself coupled debts and legacies together; so the rule applies under the will to legacies as well as debts.

Arnold Herbert, for Laura Anne Williams, supported the same contention.

Dibdin and *A. L. Ingpen*, for the trustees of the will. The statutory execution of the power enures for the benefit of the legatees as much as for the benefit of the donees of the residue: *In re Wilkinson.* (1)

[They were stopped by the Court.]

NORTH J. stated the facts, and continued:—There is no exercise by the will in terms of the power of appointment which she had over the 2000*l.* The 2000*l.* was absolutely her own unless she appointed it away, and she did not do so; therefore, being her own, it would pass under these words. Then it is said that the Wills Act alters the whole state of things and provides for her an appointment which she did not make by her will, and which would be at variance altogether with what she has said in her will, because if the 2000*l.* is technically appointed by her will to the persons named they will take in such a way that the appointed fund cannot be applied in payment of debts and legacies till all the rest of the estate is applied. I do not follow the argument at all. I

(1) (1869) L. R. 4 Ch. 587.

NORTH J. 1899 WILLIAMS v. WILLIAMS. HARTLEY, *In re.* WILLIAMS v. JONES.

do not think that in this case this constructive introduction into the testatrix's mind of the provisions of the Act of Parliament ought to have the effect of altering or perverting the plain meaning of the will itself. Before I read the section I will mention again what the position of the personalty is. There are certain pecuniary legacies and certain annuities. I have not looked through the will to see whether there are any specific legacies or anything of that sort. It does not seem to me that they would be material at all, and I assume for this purpose that the words I have referred to are all that deals with the personal estate. That being so, I will refer to the Act. Sect. 27 says (I will read only the material words): "A bequest of the personal estate of the testator, or any bequest of personal property described in a general manner, shall be construed to include any personal estate . . . . which he may have power to appoint in any manner he may think proper, and shall operate as an execution of such power, unless a contrary intention shall appear by the will." Now, in this will there is the bequest of the personal property of the testatrix contained in the passage I have referred to. The personal estate is given to pay legacies, and then the residue of it is to be given to the persons who are named. I leave out of consideration the question whether there is a direction to pay debts. Probably a direction to pay debts would be implied from the other directions which I have read. But the words I have referred to, the gift of annuities, the gift of legacies, and the gift of the residue, coupled with an implied direction to pay debts from the same sources, contain the only bequests of personal estate found in the will.

Why should it be said that any particular part of that bequest is to be treated differently from any other part? If this bequest of the personal estate is to be read by the statute, it is to be read as a bequest of personal estate over which she has a general power of appointment. I will not say that the power is excluded because the exercise of it is unnecessary, inasmuch as the 2000*l.* would pass as residue. I do not say that; but the exercise of the power is included in the disposition made of the personal estate by the will. In other words, in dealing

with the personal estate disposed of by the will, you are to treat the subject of the power as caught just as it would have been if it had been mentioned—just as if she had added the words that "in thus disposing of my personal estate I include any personal estate over which I have a general power of appointment." The effect of the statute is to treat the will just as if it contained those words, and to make it unnecessary to put them in because, although in such circumstances similar words were very often put into wills, wills were very often made without any such words, and the result was that the powers were left unexecuted. It was notorious that this was contrary to the general intention of testators, and this section was therefore passed with reference to both real and personal estate. Now the statute makes the 2000*l.* part of the testatrix's personal estate, and it must pass by the only series of gifts which are found in the will of that personal estate. It forms part of the personal estate, and therefore it goes in exactly the same way as her other personal estate, because the statute and the will together include that as part of her personal estate. There is not a trace of any intention that the 2000*l.* is to be left out of the will. On the contrary, she says that she is dealing with it. She gives all her personal estate, and that passes with it. The bequest includes and comprehends any personal estate she had power to appoint.

When it is pressed upon me that there are two funds, one her own personal estate and another a fund over which she has power of appointment, it is inventing something for which there is no foundation whatever. The distinction is certainly not to be found in the will or in the Act.

Solicitors: *Clayton, Sons & Fargus; Woodcock, Ryland & Co., for Griffith, Son & Adams, Dolgelly; Metcalfe & Sharpe, for H. P. Charles, Neath; Woosnam & Smith, for Minshall, Parry-Jones & Co., Llangollen.*

H. C. R.

NORTH J.

1899

Nov. 23.

In re ARBITRATION BETWEEN PARRY AND HOPKIN.

Leaseholds—Tenant for Life—Waste.

A tenant for life of leaseholds is not liable to the remainderman for permissive waste.

The estate of a tenant for life of leaseholds *held* not liable to the remainderman for repairs made necessary by the non-fulfilment, during the life tenancy, of covenants to repair.

THOMAS MORGAN, who died in 1885, devised and bequeathed a freehold house where he lived and leasehold houses held under two leases to his wife Mary for life, and after her death to his niece Sarah Thomas (now Sarah Parry). Both leases contained covenants to keep the premises subject to them in good repair, and at the end of the respective terms to deliver them up in good repair. The testator's widow died in December, 1897. Sarah Parry made a claim against Edward Hopkin and Richard Thomas, the executors of Mary Morgan, in respect of alleged dilapidations of the property suffered during her life. The claim was submitted to arbitration.

This was a special case stated by the arbitrator for the determination of the question whether the estate of Mary Morgan was liable to Sarah Parry for such dilapidations.

L. M. Richards, for the executors of Mrs. Morgan. A tenant for life is not liable to the remainderman for permissive waste: *In re Cartwright.* (1)

Rowland Rowlands, for Mrs. Parry. An equitable tenant for life has been held liable for dilapidations allowed to happen in breach of a covenant in the lease, so far as they occurred during the life tenancy: *In re Betty.* (2)

NORTH J. In my opinion the claim by Mrs. Parry fails. By the testator's will leasehold estates are given to a tenant for life and remainderman. The tenant for life and every successive owner of the lease is bound as between himself and the testator's estate to perform the covenants and indemnify the estate.

(1) (1889) 41 Ch. D. 532. (2) [1899] 1 Ch. 821.

The case of *In re Betty* (1) was relied upon by the remainderman; but that was a case in which an equitable tenant for life was held bound to indemnify the estate of her testator against the consequences of not performing covenants during the life tenancy. Of course she was so bound: all persons who take under such a bequest are bound; they need not take the gift, but if they do they take the burden. If they disclaim they escape liability; if they do not they take subject to the burden of the obligations imposed by the lease, which almost always, as in the present case, include a covenant to repair. This is a claim by a legal tenant in remainder for loss from finding on coming into possession the premises out of repair, and having to put them in repair. I asked if any case could be found in which such a claim had been allowed. None was cited. It seems to me that the case is entirely different from *In re Betty* (1), but like *In re Cartwright.* (2) It is quite true that that was a case of freeholds. But I do not see what difference that makes in principle. If there had been a claim by the lessor against the testator's estate, a different state of things would have arisen: it may be that the testator's estate could recover against the estate of the tenant for life for waste during the life interest, but not against the tenant in remainder. But I know of no action to enforce such a claim as this.

Solicitors: *T. Protheroe Price, for T. T. Lewis, Bridgend; Wrentmore & Son, for Stockwood, Bridgend.*

(1) [1899] 1 Ch. 821. (2) 41 Ch. D. 532.

D. P.

NORTH J.
1899
Nov. 18, 25.

In re ROSS.
ASHTON *v.* ROSS.

[1885 R. 2412.]

Administration—Insolvent Estate—Annuity—Appropriation of Capital Sum —Married Woman—Restraint on Anticipation.

In the final distribution of an insufficient estate the dividend on the capital value of an annuity bequeathed to a married woman, with restraint on anticipation, was ordered to be laid out in the purchase of an annuity for her. Before the annuity was purchased she died:—

Held, that the capital belonged to her estate.

THOMAS ROSS, the testator in this action, died in August, 1885, having bequeathed to Farlow Sergeant and his wife, the testator's daughter Margaret Sergeant, an annuity of 200*l.* during their joint lives, and from and after the decease of either of them an annuity of 100*l.* during his or her life; such annuity, if the said Margaret Sergeant should be the survivor, to be for her sole and separate use, free from marital control, and without power to anticipate the growing payments thereof.

The testator's estate turned out insufficient to pay in full all the legacies and annuities bequeathed by his will, and this action was instituted for the administration of his estate.

The Court construed the above bequest to be equivalent to a bequest of a separate annuity of 100*l.* to Farlow Sergeant for his life, and a separate annuity of 100*l.* to Margaret Sergeant for her life for her separate use without power of anticipation.

An order was made in the action, dated August 14, 1899, dealing with funds in court to the credit of the action. This order was to some extent in the nature of a compromise: it provided for the payment of a few trifling legacies in full; for payments to make up the sums paid on the other legacies and instalments of annuities due up to date—to 80 per cent. of payment in full—and the payment of the present value of, or, where the annuitant was under disability, the purchase

of, a Government annuity of 80 per cent. of each annuity bequeathed.

A payment schedule to this order provided for payment of "The amount at which Thomas Newn Ashton," the sole surviving trustee and executor of the will, "and Margaret Sergeant shall contract for the purchase of an annuity of 80*l.* on the life of Margaret Sergeant in the names of Thomas Newn Ashton and Margaret Sergeant," to the Commissioners for the Reduction of the National Debt. Provision was also made for the distribution of the balance of the funds belonging to the estate, including the purchase of an additional annuity for Margaret Sergeant.

The sum of her two annuities would have amounted to 95*l.* After the price of the annuities intended to be purchased for her had been ascertained, but before the purchases had been made, she died on August 28, 1899. An order dated September 27, 1899, was made in the action to carry over 885*l.* 11*s.* to the "account of annuity bequeathed to Margaret Sergeant (since deceased)" being the ascertained price of the annuity of 80*l.* and the proper proportion of the balance of the testator's estate that had been directed to be applied in the purchase of a further annuity.

There was now in court to the credit to the above account the sum of 1049*l.* 1*s.* 3*d.*

Farlow Sergeant claimed to be entitled to this sum as legal personal representative of his wife, and petitioned for payment out to himself.

One of the legacies was provided for by carrying the proper dividend to a separate account, because it was subject to defeasance on certain contingencies; in the event of the legacy failing the estate would be sufficient to pay the effective legacies and annuities in full.

Vernon Smith, Q.C., and *R. J. Parker*, for Farlow Sergeant. Where an estate is insufficient to pay the legacies in full, the right of an annuitant is to have the capital value of his annuity ascertained, and to be paid a dividend on that capital value:

NORTH J. 1899 ROSS, *In re.* ASHTON *v.* ROSS.

Wroughton v. *Colquhoun* (1); *Carr* v. *Ingleby* (2); *Long* v. *Hughes*. (3) The estate here, at present, is insufficient, the parties and the Court have treated it as insufficient, and the parties cannot now be heard to say that it is not. By the order of August Mrs. Sergeant's share was set apart and appropriated beyond recall; it became hers subject only to this—that during the life of her husband she could not receive the capital; her disability was a question that did not concern the other legatees, who cannot be benefited by the accident of her death; the fund carried over belongs to her estate, and should now be paid to her representative.

In *In re Mabbett* (4) a contract for sale of land had been made to provide for the values of annuities. One annuitant died before the contract was carried out; another after the contract was carried out, but before receiving anything. The estate of the former was held not to be entitled, the estate of the latter to be entitled, to the value of the annuity. That decision supports our view.

Hon. E. C. Macnaghten, Q.C., and *Northcote*, for the residuary legatee; and

Hon. T. H. Watson, for another annuitant. The estate should not be treated as insufficient now, for if this capital goes back to the estate there will be enough, and in certain events and in other ways it may become sufficient.

Assuming the rules as to the administration of insufficient estates to apply, there is no good reason why the husband should receive a sum which his wife could not have got, and which never could have belonged to her. The arrangement contemplated, owing to an accident, became impossible, and this windfall goes to the estate, and not to the husband.

NORTH J. I think in this case the husband is entitled to take the money carried over. [After stating the facts, he continued:—]

In this case the estate is insufficient; or it has been and

(1) (1847) 1 De G. & Sm. 357.
(2) (1831) 1 De G. & Sm. 362, n.
(3) (1831) 1 De G. & Sm. 364, n.
(4) [1891] 1 Ch. 707.

must be treated, at the present time and for the purpose of the question before me, as insufficient to pay the legacies in full.

The right of an annuitant sui juris in the case where the estate is treated as insufficient is to have the value of the proportionate part of the annuity paid over in cash. This right he has independently of any wish on the part of the residuary legatee. He could say, "I will take the money; I do not want an annuity; if an annuity is purchased for me I shall sell it." It would, therefore, be of no use to waste the money in the purchase of an annuity, and he is allowed to take the value in money. That is the right of the legatee under those circumstances. If the estate were ample to pay the annuity in full, that would be another matter. All that the annuitant would then be entitled to would be to have the annuity kept down out of the estate.

Here the husband and wife were both alive when the time for distributing the estate came; a difficulty arose as to paying the wife the capital value of her annuity because she was restrained from anticipating it. I did not see my way to direct payment to her. The amount which was directed to be laid out in purchasing an annuity upon her life was a substantial sum, as the expectation of her living was great. As she died after the amount was fixed but before the annuity was actually purchased, the question now arises who is entitled to that fund which would have been laid out in the purchase of an annuity, simply because she was a married woman and restrained from anticipation. Suppose the husband had died before the annuity was purchased, the restraint being removed, she would have been entitled to take the capital, which she was only prevented from receiving because she could not give a receipt. So when she died, her surviving husband, as her representative, is entitled to receive the fund that belonged to her. That an annuitant under a will where the estate is insufficient is entitled to receive as from the death of the testator a dividend in proportion to the capitalized value of the annuity was decided in *Long* v. *Hughes* (1), which seems to me exactly

(1) 1 De G. & Sm. 364, n.

NORTH J. 1899 ROSS, *In re.* ASHTON *v.* ROSS.

like the present case, except for the temporary incapacity of the lady to receive the capital while she and her husband were both alive; otherwise that case seems to be exactly like the present case and to govern it.

Solicitors: *Collyer-Bristow & Co., for Goy & Cross, Barton-on-Humber; Hicks & Son, for Allison & Co., Louth.*

D. P.

SILKSTONE AND HAIGH MOOR COAL COMPANY v. EDEY.

STIRLING J.

1899

Oct. 31; *Nov.* 1, 8.

[1895 S. 2158.]

Vendor and Purchaser—Setting aside Sale—Sale by Liquidator of Undertaking of Company—Fiduciary Relation—Concealment—Liability of Liquidator—Account of Profits—Interest on Profits.

Upon the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

The practice is correctly stated in Lewin on Trusts, 10th ed. p. 558.

Where a liquidator sold the undertaking of the company nominally to a new company, but really to himself, and the sale was set aside on the ground of concealment, and the property ordered to be reconveyed to the old company:—

Held, that the liquidator and the new company were not chargeable with interest on profits received by them from the business of the new company and withdrawn by them from the business.

MOTION to vary minutes.

This action was brought by the Silkstone and Haigh Moor Coal Company, Limited, which was being wound up under the supervision of the Court, against John Edey and the Silkstone and Haigh Moor Collieries, Limited, to set aside a sale by the joint liquidators of the plaintiff company of that company's entire assets and undertaking to the defendant company, and for a reconveyance of the property to the plaintiff company with consequential relief.

The defendant Edey was one of the joint liquidators of the plaintiff company.

The main ground of the action was that the defendant Edey was really the purchaser of the undertaking, and that the defendant company was a mere trustee for him, and had been brought into existence by him for the purpose of enabling him to obtain the sanction of the Court to the sale without disclosing the true nature of the transaction.

On March 20, 1899, Stirling J. gave judgment for the plaintiffs.

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The minutes of judgment directed an account of the profits received by the defendants from the business of the defendant company, and interest on those profits at 4 per cent. per annum from the respective times of the receipt thereof.

The defendants moved to vary the minutes by (inter alia) striking out the claim for interest on the profits.

At the hearing of the motion the plaintiffs confined their claim to interest on so much of the profits as had been withdrawn by the defendants from the business of the defendant company.

Jenkins, Q.C. (*Rowden*, Q.C., with him), for the defendant Edey. To charge interest on profits is really charging interest on interest. Upon the rescission of a sale the purchaser gets back the purchase-money which he has paid with interest, and the vendor gets back his property with the profits, which are equivalent to interest; but he is not entitled to interest on the profits: Seton on Judgments, 5th ed. p. 1929, and the cases there cited. *Tate* v. *Williamson* (1) was a case of setting aside a sale on the ground of concealment by a purchaser standing in a fiduciary relation. That was a sale of land, and the purchaser was held to be accountable for the rents, but not for interest on the rents. *Plowright* v. *Lambert* (2) is not inconsistent with this, because that was a money claim, and the sums received were capital sums, and the purchaser was properly held accountable for interest on those sums. Where there is a money claim against a trustee, the trustee has to pay back the money, primâ facie, with simple interest only, though under special circumstances, with which the Court is familiar, he may be charged with compound interest as in *In re Barclay*. (3) If the trustee has employed the money in trade, the cestui que trust may elect to take the profits, but he cannot get interest on those profits: *Jones* v. *Foxall*. (4) *Imperial Mercantile Credit Association* v. *Coleman* (5) is a different case. That refers to secret profits. There the directors had to pay

(1) (1866) L. R. 1 Eq. 528; 2 Ch. 55.
(2) (1885) 52 L. T. 646.
(3) [1899] 1 Ch. 674.
(4) (1852) 15 Beav. 388.
(5) (1873) L. R. 6 H. L. 189.

interest, because as between them and the company the money which they had taken was a capital sum. It was only called a secret profit from the point of view of the transaction; it was not profit in the nature of income.

Gatey (*Warmington, Q.C.*, with him), for the defendant company, adopted the foregoing argument, and further submitted that the company ought not to be held liable for any act of the defendant Edey in drawing out the money.

Upjohn, Q.C., and *R. F. Norton*, for the plaintiffs. This is a case of restitutio in integrum. The plaintiffs are getting back the profits on the footing that they are their property: why then are the defendants not liable to pay interest on those profits? It is immaterial whether the sum of money which the plaintiffs recover stands to capital account or income account. The cases cited in Seton, pp. 1939–40, proceed on the footing that a trustee who has got money in his pocket belonging to his cestui que trust, whether income or capital, must pay interest upon it: *Imperial Mercantile Credit Association* v. *Coleman* (1); *Boston Deep Sea Fishing and Ice Co.* v. *Ansell* (2); *Panama and South Pacific Telegraph Co.* v. *India-rubber, Gutta Percha, and Telegraph Works Co.* (3) In *Attorney-General* v. *Alford* (4) and *Walrond* v. *Walrond* (5) the trustee was charged with interest on the dividends in his hands as well as on the capital. Those cases shew that, whether the money in the hands of the trustee is the beneficiary's capital or the beneficiary's income, it is a debt due to the beneficiary, and, according to the law of the Court, is an interest bearing debt. No distinction can be drawn between the defendant Edey and the defendant company.

Hugh Humphry and *Pattullo*, for incumbrancers of the defendant company.

Jenkins, Q.C., in reply. Where a purchase is set aside at the instance of the purchaser, which is the more common case, the purchaser is accountable for profits, but not for interest on profits: *Erlanger* v. *New Sombrero Phosphate Co.* (6); and the

(1) L. R. 6 H. L. 189.
(2) (1888) 39 Ch. D. 339.
(3) (1875) L. R. 10 Ch. 515.
(4) (1855) 4 D. M. & G. 843.
(5) (1861) 29 Beav. 586.
(6) (1878) 3 App. Cas. 1218.

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same rule applies where the vendor is claiming restitution. There are several cases in which a purchase by a trustee of the trust estate has been set aside and an account of rents directed against him, but in none of those cases was interest allowed on the rents account: *Campbell* v. *Walker* (1); *Ex parte James* (2); *Watson* v. *Toone*. (3) The Court does not presume that profits have made profits, and there is no case in which a sale has been set aside where rents and profits have been directed to carry interest.

Cur. adv. vult.

Nov. 8. STIRLING J. This was a motion to vary minutes, and the question on which I reserved my judgment was this—whether the defendants are to be charged with interest upon profits and rents received by them and withdrawn by them from the business of the defendant company. As the minutes stand, interest is proposed to be charged on all rents and profits received by the defendants; but it is admitted, and properly admitted, that that goes too far, because it is clear that a large amount of the rents and profits has been retained in the business of the company, and of this the plaintiffs will get the benefit; and the question which I have to decide is limited to that which I have stated.

Now, in support of the view that the defendants ought to be so charged, the plaintiffs rely on various decisions which shew that a trustee who makes a secret profit is charged with the interest thereon: see Seton, pp. 1939–40. These decisions are in strict accordance with the principle laid down in *Attorney-General* v. *Alford* (4) and *Burdick* v. *Garrick*. (5) The trustee has retained in his own hands part of the trust property, and is liable to be charged with the interest he actually received, or that which the Court is entitled to say that he ought to have received.

The present case, however, is not of that exact character: it is one in which the point to be considered is, what are the

(1) (1800) 5 Ves. 678, 682; 5 R. R. 135.
(2) (1803) 8 Ves. 337, 351; 7 R. R. 56.
(3) (1820) 6 Madd. 153.
(4) 4 D. M. & G. 843.
(5) (1870) L. R. 5 Ch. 233.

proper terms on which a sale improperly made by a liquidator, standing in a fiduciary relation to the plaintiffs, ought to be set aside. With reference to this the law is thus stated in Lewin on Trusts (I read from the 10th edition), p. 558: "The cestui que trust, if he chooses it, may have the specific estate reconveyed to him by the trustee, or, where the trustee has sold it with notice, by the party who purchased, the cestui que trust on the one hand repaying the price at which the trustee bought, with interest at 4 per cent., and the trustee or purchaser on the other accounting for the profits of the estate, but not with interest, and if he was in actual possession, being charged with an occupation rent." That statement occurs in all the editions of Lewin which I have been able to consult, including the second, which appeared in the year 1842. The only authority which is cited in support of it is an Irish case of *Macartney* v. *Blackwood*. (1) That was a case in which the suit was brought by the cestui que trust against the trustee and a purchaser, and it appeared that the sale had been made by the trustee under a trust for sale for payment of debts; but when the sale took place all the debts had been paid, and the purchaser had notice of that fact. Of course the sale was set aside, and it is stated in the report that the only question was whether the plaintiff was entitled to interest on the rents from the time they were received. The learned counsel for the plaintiff appear to have relied on a case in Brown's Parliamentary Cases, and on some cases in the Irish Exchequer. The Lord Chancellor says: "In the case in Brown, the defendants held the trust money in their hands, and therefore were properly decreed to pay interest: the cases in the Court of Exchequer also were properly determined, but do not apply to the present case. I shall always find great difficulty in departing from the settled rules of courts of equity, and there is none more settled than, that where a sale to a purchaser with notice is set aside, he shall account for the rents, but not with interest: then if you cannot get interest as against the purchaser, in what view do you come against the defendant Sir John Blackwood?—you can only come against

(1) (1795) Ridg. Lapp & Sch. 602, 604.

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him in default of payment by the purchaser; you come against him as a simple contract creditor and on that head you are not entitled to interest," and interest was refused. This judgment appears to be based on the fact that the rents were received, not by the trustee, but by the purchaser. His title was bad as against the plaintiff, but he did not himself stand in a fiduciary relation to the plaintiff, and it might be thought that a trustee who received rents and profits ought to be charged with interest on them. It was pointed out, however, that it does not appear to have been the practice to charge such interest, and I was referred to various cases in which the reports shewed, or appeared to shew, that interest had not been charged. I have examined the original records in some of these cases, particularly those in *Watson* (or *Whatton*) v. *Toone* (1) and in *Tate* v. *Williamson* (2), the decree in which is also given at Seton, p. 1929; and these bear out the contention of the defendants' counsel. I have myself failed to find any case in which a trustee has been expressly charged with interest on rents upon a sale to him being set aside. In the absence of any express authority on the point, I must take it that the settled practice of the Court is as stated in Lewin, and the minutes must be altered accordingly.

Solicitors: *Badham & Williams; T. W. Hall; Bell, Brodrick & Gray, for Rodgers, Thomas & Sandford, Sheffield; Torr, Gribble, Oddie & Sinclair, for Stewart & Chalker, Wakefield; Jaques & Co., for Porrett & Fawcett, Sheffield.*

(1) 6 Madd. 153; see also 5 Madd. 54. (2) L. R. 1 Eq. 528.

H. B. H.

STIRLING J.
1899
Nov. 29;
Dec. 7.

In re McMAHON.
FULLER *v.* McMAHON.

[1898 M. 2133.]

Company—Shareholder—Death of Shareholder—Insolvent Estate—Administration—Proof of Debts—Liability to Future Calls—Judicature Act, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 4, 6, 8.

By virtue of s. 10 of the Judicature Act, 1875, and s. 37 of the Bankruptcy Act, 1883, a company may prove, in the administration of the estate of a deceased shareholder whose estate is insolvent, for the estimated value of the liability to future calls in respect of the shares standing in his name.

THIS was a creditors' action for the administration of the estate of Captain Francis Yorke McMahon, deceased. The estate was insolvent. At the date of his death, July 6, 1897, the deceased was the registered holder of 785 ordinary shares of 5*l.* each in the Western Mortgage and Investment Company, on which 1*l.* 10*s.* per share only had been paid up. Three calls of 5*s.* each had since become due and payable, and there remained a liability of 2*l.* 15*s.* on each share. The company sought to prove in this action for the unpaid calls, and also for the estimated future liability upon the shares.

The claim in respect of the future liability was divided by the estimate of the accountant into two parts. First, it was estimated that three calls of 5*s.* each would be made by the company in July, 1899, January, 1900, and July, 1900, and the present value of each of these three calls was separately calculated. Then, there was an estimate of the present value of the further liability of 2*l.* per share still remaining uncalled. The total value of the claim in respect of the future liability was estimated at 1279*l.* 13*s.* 2*d.*

The master's certificate admitted the claim as regards the unpaid calls already made by the company, but rejected it as regards the future liability. A summons was taken out by the

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It appeared that the main object of the company was to invest money on mortgage of lands in the United States of America. The company had raised large sums by the creation and issue of debentures and debenture stock, and had invested the money so raised on such mortgages. These investments had not been fortunate, and for some time past the income thence derived had been insufficient to meet the debenture interest. In order to place matters on a better financial basis the directors had made a series of calls of 5*s*. each at considerable intervals, and had applied the proceeds in paying off debentures and purchasing debenture stock at a discount; and it was hoped that, when three or four more calls had been made in this way, the debenture debt would be sufficiently reduced to permit of the interest then being paid out of the income of the company. At present the shares were unsaleable. For the purposes of proof, the value of the lien to which the company was entitled under the articles of association had been estimated at zero.

Whinney, for the company. The liability of a shareholder in respect of the unpaid balance of his shares is a debt provable in bankruptcy within s. 37 of the Bankruptcy Act, 1883. (1)

(1) The material provisions of s. 37 of the Bankruptcy Act, 1883, are as follows:—

Sub-s. 3 provides, subject to the exceptions contained in sub-ss. 1 and 2, which are not material for the present purpose, that "all debts and liabilities, present or future, certain or contingent, to which the debtor is subject at the date of the receiving order, or to which he may become subject before his discharge by reason of any obligation incurred before the date of the receiving order, shall be deemed to be debts provable in bankruptcy."

Sub-s. 4: "An estimate shall be made by the trustee of the value of any debt or liability provable as aforesaid, which by reason of its being subject to any contingency or contingencies, or for any other reason, does not bear a certain value."

Sub-s. 6: "If, in the opinion of the Court, the value of the debt or liability is incapable of being fairly estimated, the Court may make an order to that effect, and thereupon the debt or liability shall, for the purposes of this Act, be deemed to be a debt not provable in bankruptcy."

Sub-s. 8: "'Liability' shall for the purposes of this Act include any compensation for work or labour done, any obligation or possibility of an

It is a "possibility of an obligation to pay money" within sub-s. 8 of that section; and by s. 10 of the Judicature Act, 1875, these provisions apply in the administration of the estate of a deceased insolvent.

The company being a going concern, s. 75 of the Companies Act, 1862, does not apply, and it is necessary to have recourse to the general law. In Lindley on Companies, 5th ed. p. 556, it is laid down that upon a shareholder becoming bankrupt "his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not." This liability is not more difficult to estimate than the liability in *Hardy* v. *Fothergill* (1), which governs the present case. See also *Barnett* v. *King* (2); *Wolmershausen* v. *Gullick* (3); *In re Paine* (4); *In re Herepath and Delmar* (5); and *In re Mercantile Mutual Marine Insurance Association.* (6)

Upjohn, Q.C., and *Ingpen*, for the legal personal representative of the deceased shareholder. This claim depends entirely upon the special nature of the relationship existing between a shareholder and the company, and must be governed by the Companies Acts; but s. 75 of the Act of 1862 applies only in the case of a company in liquidation. That section contains an express provision for the bankruptcy of the contributory. That is by implication a recognition that when the company is a going concern it is impossible to compel a shareholder to pay up in advance. No doubt, if this company were in liquidation, an estimate for the future liability of a bankrupt contributory

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obligation to pay money or money's worth on the breach of any express or implied covenant, contract, agreement, or undertaking, whether the breach does or does not occur, or is or is not likely to occur or capable of occurring before the discharge of the debtor, and generally it shall include any express or implied engagement, agreement, or undertaking, to pay, or capable of resulting in the payment of money, or money's worth, whether the payment is, as respects amount fixed or unliquidated; as respects time, present or future, certain or dependent on any one contingency or on two or more contingencies; as to mode of valuation capable of being ascertained by fixed rules, or as matter of opinion."

(1) (1888) 13 App. Cas. 351.
(2) [1891] 1 Ch. 4.
(3) [1893] 2 Ch. 514.
(4) [1897] 1 Q. B. 122.
(5) (1890) 7 Morrell, 129.
(6) (1883) 25 Ch. D. 415, 420.

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might be obtained, and the liquidator would have complete power to work out all the equities to which the transaction might give rise. But the difficulties are much greater in the case of a going company. Supposing the company gets this 1280*l.*, how is it to be applied? That sum is claimed as a commutation of the whole liability of the shareholder, and therefore his shares must be treated as having been paid up in full. But that would be contrary to s. 25 of the Companies Act, 1867, for the company will be getting less than the whole amount required to pay up the shares in full, and no contract can be registered in respect of these shares, because the section provides for the filing of the contract before the issue of the shares. The difficulties in the way of saying that these shares are fully paid up are insuperable. If, on the other hand, the money is to be treated as payment pro tanto only, the bankrupt may object that he is entitled to have the shares fully paid up. Further, if this claim were admitted, it would be impracticable to adjust the equities between the different members.

Sect. 37 of the Bankruptcy Act, 1883, has no application to the present case, because the bankrupt cannot be put in the position of having paid up his shares in full.

Tallents, for the plaintiff in the action.

Whinney, in reply. The objections raised to this claim apply equally to every liability provable in the bankruptcy. The shares will be treated as having been paid in full. Directors cannot enter into an agreement with a member that he shall pay less than the nominal amount of his shares, but they are not prohibited from recovering from a bankrupt shareholder such amount as they can upon shares actually issued. It cannot have been intended that the bankrupt should be liable to be sued hereafter in respect of the unpaid balance of his shares. The Bankruptcy Act, 1883, makes no distinction between past and future calls. If the directors had not made this claim they would have been guilty of a breach of duty to the company. At the time of the passing of the Companies Act, 1862, there was no provision in the Bankruptcy Acts then in force corresponding to s. 37 of the Act of 1883.

Sect. 75 of the Companies Act, 1862, however, altered the

law to a certain extent, and that provision has now been extended by the Bankruptcy Acts of 1869 and 1883 to all liabilities now provable in bankruptcy.

Cur. adv. vult.

Dec. 7. STIRLING J. (after stating the facts as above). By s. 10 of the Judicature Act, 1875, the rules as to debts and liabilities provable which are in force under the law of bankruptcy with respect to the estates of persons adjudged bankrupt regulate the admissibility of the claim. The material bankruptcy rules are to be found in the Bankruptcy Act, 1883, s. 37, sub-ss. 3, 4, 6, 8. [His Lordship read the sub-sections.] The definition of "liability" in sub-s. 8 is expressed in the widest possible terms. It is derived from s. 31 of the Bankruptcy Act, 1869, under which it was held in *Hardy* v. *Fothergill* (1) that a claim by lessees against an assignee of a lease under a covenant for indemnity by the assignee against breaches of covenants in the lease was provable in the bankruptcy of the assignee. The present claim falls within the terms of s. 37 of the Bankruptcy Act, 1883; and in Lindley on Companies, 5th ed. p. 556, it is said: "Under this Act, when a shareholder becomes bankrupt, all calls in arrear are provable as debts, and his liability to future calls may be estimated and proved as well when the company is being wound up as when it is not." This statement of the law, although not binding on me, is nevertheless a weighty authority in support of the claim.

Various objections were however taken, based on the provisions of the statutes which govern joint stock companies. Proof in bankruptcy, it was said, is equivalent to payment; and this proposition was conceded by the learned counsel for the applicants. It was then contended that, this being so, the result of proof in bankruptcy would be that the shares would become fully paid up, and that this would be contrary to s. 25 of the Companies Act, 1867. That enactment, however, does not prohibit every act on the part of a company which may give rise to an obligation to treat the shares as if they were fully paid up. Thus it was held in *Burkinshaw* v. *Nicolls* (2) that a

(1) 13 App. Cas. 351.
(2) (1878) 3 App. Cas. 1004.

STIRLING J. company by issuing a certificate that the shares to which it relates are fully paid up may preclude itself as against a holder for value without notice from insisting on payment in cash. Lord Cairns says (1): "It appears to me that it" (i.e., s. 25) "leaves altogether untouched the question of the payment of the money upon the share, which payment it declares shall, no doubt, be an attribute or a condition of every share in the company. But how that is to be, or what is to be evidence of that payment, it leaves altogether untouched."

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It was also said that difficulties would or might arise in adjusting the rights between the holders of these shares and other shareholders who had paid up in cash. This is possible. Similar difficulties may also arise in working out rights upon the exercise of the power of forfeiture conferred by articles of association in the form of Table A to the Act of 1862. The existence of such difficulties is not sufficient to authorize the Court to decline to recognise a statutory right, if, on the fair construction of the statute, it is seen that the Legislature intended that the right should exist.

Lastly, it was said that by s. 75 of the Companies Act, 1862, express provision is made for proof against the estate of a bankrupt contributory of a company which is being wound up in respect of liability to future calls, while there is no such provision as regards a bankrupt holder of shares in a going company. At the time when the Companies Act, 1862, was passed the right of proof in bankruptcy depended on the Bankruptcy Acts of 1849 and 1861, in neither of which are to be found any enactments so extensive as those of s. 31 of the Bankruptcy Act of 1869 and s. 37 of the Bankruptcy Act of 1883. As to these last it is remarked by Lord Selborne in *Hardy* v. *Fothergill* (2) that they "are not confined (as those of the former Acts were) to certain specified kinds of contingent debts and liabilities, but they are expressed in general and comprehensive terms, so as . . . . to indicate, primâ facie at all events, that 'it was the object of the Legislature to discharge the bankrupt from every possible liability.'" Sect. 75 of the Companies Act, 1862, may, I think, be regarded as a step by the

(1) 3 App. Cas. 1016. (2) 13 App. Cas. 360.

Legislature towards the attainment of this object rather than as affording an inference that going companies should not enjoy a right of proof within the terms of s. 37 of the Bankruptcy Act, 1883. Sect. 55 of this Act enables a trustee in bankruptcy to disclaim onerous property of various kinds, including shares or stock in companies; and it is provided that such disclaimer shall operate to determine (amongst other things) the liability of the bankrupt and his property in respect of the property disclaimed. This section is not made applicable to the administration of the insolvent estates of deceased persons, but may, I think, be legitimately taken into consideration in determining whether the Legislature meant that a bankrupt should be released from liabilities of the description which I have to consider. It certainly shews that such liabilities were within the contemplation of the Legislature in passing the Act of 1883, and, in my judgment, the Legislature did intend to enable a bankrupt to get released from them That being so, it follows that the claim ought to be admitted.

Solicitors: *Markby, Stewart & Co.; H. B. Worrell & Son*; *Freshfields & Williams.*

H. B. H.

STIRLING J.

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Nov. 2, 9, 21; *Dec.* 15.

In re TURNBULL. TURNBULL *v.* NICHOLAS.

[1899 T. 400.]

Practice—Process—Attachment—Married Woman Administratrix—Order for Payment into Court—Form of Order—Non-compliance with Order—Debtors Act, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2; *ss.* 18, 24—*Rules of Supreme Court*, 1883, *Order* XLII., *rr.* 4, 24.

Where a married woman administratrix is ordered to pay into court a sum of money belonging to the estate of the intestate and shewn by her account of the intestate's personal estate to be in her possession, in the absence of any evidence that she has committed a devastavit, the order should be in the common form and should not be restricted to payment out of her separate estate; and if she fails to comply with the order the Court has jurisdiction to make an order for attachment against her.

Scott v. *Morley*, (1887) 20 Q. B. D. 120, explained and distinguished.

But *semble*, if the object of the order had been, not for the better securing of the fund, but to compel the married woman to make good a loss occasioned by her devastavit, the order should have been made in the form prescribed in *Scott* v. *Morley*, and she would not have been liable to attachment for non-compliance with it.

THE defendant, Agnes Nicholas, a married woman, was the legal personal representative of Catherine Turnbull, deceased, an intestate, and was by orders dated May 8, 1899, and July 10, 1899, ordered to deliver an account of the personal estate of the intestate come to her hands. In pursuance of these orders she, on July 22, 1899, exhibited an account whereby it appeared that the sum of 277*l.* 13*s.* 7*d.*, forming part of the personal estate of the intestate, was in her hands. By an order dated August 10, 1899, she was ordered to pay the amount into court within four days. The defendant failed to comply with this order, and a motion was made for leave to issue a writ of attachment.

Upon the hearing of the motion it was agreed that it should be open to the defendant to take objection to the form of the order of August 10, 1899.

G. Henderson, for the plaintiff. By virtue of the Married Women's Property Act, 1882, s. 1, sub-s. 2, a married woman

may be sued in contract or in tort as if she were a feme sole, and by s. 18, if she is an executrix or administratrix, she may be sued in the same way. By s. 24 "contract" includes the acceptance of any trust or of the office of executrix or administratrix, and the provisions of the Act as to liabilities of married women are extended to all liabilities by reason of breach of trust or devastavit. (1)

The decision in *Scott* v. *Morley* (2) shews that s. 5 of the Debtors Act, 1869, gave to the Court a new jurisdiction altogether, and the extent of that jurisdiction was to be found from the provisions of the Debtors Act and the Married Women's Property Act, 1882. The Court of Appeal said that the separate estate of the married woman was to be the extent of the liability. Sect. 4 of the Debtors Act only preserved the old jurisdiction; it gave no new jurisdiction.

A married woman could act as a trustee or administratrix long before the Debtors Act, 1869, was passed: *Lake* v. *De Lambert* (3); Lewin on Trusts, 10th ed. p. 32.

(1) The material provisions of the Married Women's Property Act, 1882, are as follows:—

Sect. 1, sub-s. 2: "A married woman shall be capable of entering into and rendering herself liable in respect of and to the extent of her separate property on any contract, and of suing and being sued, either in contract or in tort, or otherwise, in all respects as if she were a feme sole, and her husband need not be joined with her as plaintiff or defendant, or be made a party to any action or other legal proceeding brought by or taken against her; and any damages or costs recovered by her in any such action or proceeding shall be her separate property; and any damages or costs recovered against her in any such action or proceeding shall be payable out of her separate property, and not otherwise."

Sect. 18: "A married woman who is an executrix or administratrix alone or jointly with any other person or persons of the estate of any deceased person, or a trustee alone or jointly as aforesaid of property subject to any trust, may sue or be sued . . . . without her husband, as if she were a feme sole."

Sect. 24: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix, and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage, and her husband shall not be subject to such liabilities unless he has acted or intermeddled in the trust or administration. . . ."

(2) 20 Q. B. D. 120.

(3) (1799) 4 Ves. 592 a.

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It is clear that she was under no incapacity in that respect. The case of *In the Goods of Ayres* (1) illustrates the effect of the Act of 1882 upon a married woman administratrix, namely, that the concurrence of the husband in the bond is no longer necessary. In the case of a grant of administration to a married woman before the Act of 1869 she would have been an accounting party, and a court of equity would have had jurisdiction to make an order against her, and to commit her on non-compliance.

[STIRLING J. The husband being liable, could she have been committed? Is there no authority on that?]

I can find none. Suppose the case of a married woman deserted by her husband and having a large amount of trust property in her hands, would the Court of Equity have had no jurisdiction over her? I submit it would. At any rate, since the passing of the Married Women's Property Act, 1882, she can be an accounting party, and the jurisdiction to commit an accounting party who admits having trust funds in his hands is preserved by s. 4 of the Debtors Act, 1869.

[STIRLING J. referred to Lewin on Trusts, p. 33, and the authorities there cited.]

Sect. 18 of the Married Women's Property Act, 1882, does more than enable a married woman administratrix to be sued without her husband: it means that the remedy can be pursued against her up to judgment and execution, including the liability to arrest if she proves a defaulter. Sect. 24 does not detract from the effect of s. 18.

H. L. Fraser, for the defendant. I admit that a married woman could be a trustee or administratrix before the Act of 1869, but when she was in that position and committed a breach of trust or devastavit the order always went against the husband. If she had separate estate, execution could be had against that, but she was never liable to be attached. Sect. 4 of the Debtors Act substitutes the remedy of attachment in place of the old process of ne exeat regno. The practice of the Court of Chancery is illustrated by *Pannell* v. *Tayler* (2), which

(1) (1883) 8 P. D. 168.

(2) (1823) T. & R. 96.

shews that a writ of ne exeat regno could not be sustained against a married woman administratrix.

[*G. Henderson* referred to *Pemberton* v. *M'Gill.* (1)]

That was merely an action for an account. If the Married Women's Property Act, 1882, had effected no change in the law, there might have been something to be said for the plaintiff's contention. But it has made a difference: see sub-s. 1, sub-ss. 2, 3, and ss. 18 and 24. If the matter rested on s. 18 alone, the defendant would have no case; but by s. 1, sub-s. 2, the liability of a married woman in respect of any contract is limited to the extent of her separate estate: see *Scott* v. *Morley* (2); and s. 24 makes the acceptance of the office of trustee or administratrix a contract within the Act. Therefore the remedy is against the separate estate of the married woman, and not against her personally.

Cur. adv. vult.

Nov. 21. STIRLING J. (after stating the facts as above). Upon this motion coming before me, counsel raised the objection that the defendant, being a married woman, was not liable to attachment. It was also suggested that the order of August 10, 1899, was wrong in form, and ought to have been made in the form settled by the Court of Appeal in *Scott* v. *Morley*. (2) It was agreed that this point should be disposed of on the hearing of the motion as if the defendant had given notice of motion to discharge or vary the order of August 10, 1899. By Order XLII., rr. 4, 24, an order for payment of money into court may be enforced by writ of sequestration, or in cases in which attachment is authorized by law by attachment. As is pointed out by Chitty J. in *In re Greer* (3), attachment here means attachment of the person. By virtue of the third exception in s. 4 of the Debtors Act, 1869, such attachment is authorized by law in the case of default by a trustee or person acting in a fiduciary capacity and ordered to pay by a court of equity any sum in his possession or under his control. If the defendant were not a married woman, there would clearly be jurisdiction to order the issue of the writ.

(1) (1855) 25 L. J. (Ch.) 49. (2) 20 Q. B. D. 120.
(3) [1895] 2 Ch. 217.

STIRLING J. 1899 TURNBULL, *In re.* TURNBULL *v.* NICHOLAS.

What was decided in *Scott* v. *Morley* (1) was that there was no power under s. 5 of the Debtors Act, 1869, to commit to prison a married woman for her default in paying a sum for which judgment had been recovered against her in a court of law, and which, under s. 1, sub-s. 2, of the Married Women's Property Act, 1882, was "payable out of her separate property and not otherwise." The proper form of judgment in such a case was settled by the Court of Appeal, and is to be found at p. 132 of the report. [His Lordship read the form of judgment.] The decision plainly does not govern the present case; but it is necessary to consider the reasons on which it was based, and ascertain how far they apply. Put shortly, the ratio decidendi appears to be this: s. 1, sub-s. 2, of the Act confers on a married woman the capacity of entering into and rendering herself liable, in respect of and to the extent of her separate estate, on any contract, and of suing and being sued, either in contract or tort, as if she were a feme sole; but the damages and costs recovered against her in any action or proceeding against her are to be payable out of her separate estate and not otherwise; and this enactment (in the words of Bowen L.J.) creates only a proprietary and not a personal liability. On the other hand, s. 5 of the Debtors Act, 1869, only authorizes a committal where there is a "debt due from" the defendant; and it was held that a debt payable out of the separate property of a married woman is not a debt due from her.

I may here observe that the order in the present case is not an order for payment of a sum to a person, but for payment of a sum into court. The distinction between the two is pointed out and explained in the case already cited of *In re Greer*. (2) It is obvious that the present order does not create a debt, and that the provisions of s. 5 of the Debtors Act, 1869, have no application.

The sections of the Married Women's Property Act, 1882, which are material to be considered with reference to the present application are s. 1, sub-s. 2 (which is dealt with in *Scott* v. *Morley* (1)), ss. 18, 24. The effect of s. 1, sub-s. 2, I have already stated. It, in terms, only applies to contracts by married

(1) 20 Q. B. D. 120. (2) [1895] 2 Ch. 217.

women. Sect. 18 is the first section which deals expressly with a married woman in the capacity of executrix, administratrix, or trustee. Stated shortly, it provides that a married woman who is an executrix, or administratrix, or trustee, alone or jointly with any other person, may sue or be sued without her husband as if she were a feme sole. There is no limitation imposed by that section on the period at which the married woman becomes executrix, administratrix, or trustee. She may have so become either before or after her marriage. Sect. 24, however, begins by providing this: "The word 'contract' in this Act shall include the acceptance of any trust, or of the office of executrix or administratrix." That puts her, in regard to those offices, on the same footing as she stood with reference to a contract under s. 1, sub-s. 2. It goes on: "and the provisions of this Act as to liabilities of married women shall extend to all liabilities by reason of any breach of trust or devastavit committed by any married woman being a trustee or executrix or administratrix either before or after her marriage." That portion of the clause applies to any married woman who becomes a trustee or executrix or administratrix either before or after marriage, and it seems to me to import the provisions as to liabilities which are provided in respect of contracts by s. 1, sub-s. 2. These enactments introduced very considerable changes in the law. They enable a married woman to accept the office of a trustee, executrix, or administratrix without the consent of her husband, which she could not previously do; they make her separate estate liable for her breaches of trust and devastavits, which it previously was not: see *Wainford* v. *Heyl* (1); and they release her husband from liability and from being sued in respect of her acts. If the object of the order of August 10, 1899, was to compel the defendant to make good a loss occasioned by some act of hers amounting to a devastavit or breach of trust, I should be of opinion that much of the reasoning in *Scott* v. *Morley* (2) applied to the case before me and that the order was wrong in form, and that it ought to be discharged, or varied so as to make it accord with the form settled by the Court in *Scott* v.

(1) (1875) L. R. 20 Eq. 321. (2) 20 Q. B. D. 120.

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Morley. (1) I think, however, that such is not the object of the order. So far as appears by the evidence on which the order was made, no breach of trust or devastavit has been committed, nor any liability by reason thereof incurred by the defendant. What does appear is that the defendant has in her hands a sum of money forming part of the intestate's estate. That sum of money ought not to have been mixed up with the defendant's separate estate, but ought, if the defendant has performed her duty, to be standing to a separate account in her name as administratrix with some bank; and the object of the order is to get that sum, for greater security, transferred from the bank into court. It seems to me that an order for payment of the sum by the defendant out of her separate estate would not be appropriate to such a state of facts, and that the order was properly made in the present form. This being so, it further seems to me that the case falls within the third exception in s. 4 of the Debtors Act, 1869, and that an order for attachment may be made if there was jurisdiction to make such an order previously to the passing of that Act. Upon this, authority is very scanty; for previously to the passing of the Married Women's Property Act, 1882, the husband was liable, and orders would be naturally sought for and made against him and not against the wife. The cases of *Bell* v. *Hyde* (2) and *Ottway* v. *Wing* (3) appear to shew that attachment may in a proper case issue against a married woman, and I am of opinion that, so far as at present appears, this would be a proper case. [His Lordship then referred to an affidavit by the defendant's solicitor to the effect that the defendant had applied the sum appearing by the account to be in her hands, or part of it, in payment of the intestate's debts, but came to the conclusion that the affidavit was insufficient to enable him to exercise the powers conferred by the Debtors Act, 1878, or to ascertain how the money which came to her hands had been disposed of, and he continued as follows:—] It seems to me that the order for the issue of the writ ought to go, but that the writ ought to lie in the office for three weeks

(1) 20 Q. B. D. 120. (2) (1711) Prec. Ch. 328.
(3) (1841) 12 Sim. 90.

to enable the defendant to make a proper affidavit shewing what has become of the money traced to her hands.

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[On December 15 the matter again came before the Court upon a motion on behalf of the defendant to stay proceedings under the above order. Upon this motion the defendant filed an affidavit in which she admitted that she had committed a devastavit in respect of the fund, and she also adduced medical testimony to the effect that, having regard to the state of her health, it would seriously endanger her life to commit her to prison. Upon the latter ground the Court directed all further proceedings to be stayed.]

Solicitors: *Johnson, Weatherall & Sturt; John Greenfield.*

H. B. H.

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Dec. 12, 13.

JOHN BROTHERS ABERGARW BREWERY COMPANY *v.* HOLMES.

[1899 J. 670.]

Covenant—Restrictive Covenant—Tied Public-house—Mortgagor and Mortgagee—Assigns—Underlessee—Notice.

The owner of a leasehold public-house, subject to a first mortgage, made a second mortgage to the partners in "John Brothers," brewers, in consideration of an advance by them out of their partnership account, the partners being first described separately and afterwards referred to as John Brothers.

By a separate deed of the same date, made between the same parties described as in the second mortgage, the mortgagor in further consideration of the advance covenanted with "John Brothers, their executors, administrators, and assigns," to bind the house to "John Brothers" for the entire supply of beer, wines, and spirits so long as he, his executors, administrators or assigns, should be in possession or occupation.

Both mortgages were subsequent to the Conveyancing Act, 1881.

The transferee of the first mortgage and the assign of the equity of redemption, then in possession, having together made an underlease to the defendant, a publican, with notice of the covenant, the plaintiffs, who had purchased the business of John Brothers together with their right of supply to the public-house, and had taken a transfer of the second mortgage and an assignment of the benefit of the deed of covenant, sought to enforce the tie against the defendant:—

Held, on the construction and intention of the deeds, that—

1. The benefit of the covenant was not limited to the original firm of John Brothers, but ran with their business.

2. The covenant bound any one deriving title under the original mortgagor, including an underlessee with notice, who, though not an assign, could be bound in equity by a restrictive covenant.

3. The defendant, though apparently deriving title to his underlease under the first mortgagee as well as under the mortgagor in possession, must, according to the rule in *Roach* v. *Wadham*, (1805) 6 East, 289, be considered to hold under the better title, which, having regard to s. 18, sub-s. 1, of the Conveyancing Act, 1881, was that derived from the mortgagor in possession. He could not, therefore, set up the paramount title of the first mortgagee against the plaintiffs.

4. On the above grounds the plaintiffs were entitled to enforce the tie against the defendant.

WITNESS ACTION.

This was an action for an injunction to restrain the defendant from selling, disposing of, or supplying for consumption, either

on or off the Tondû Arms, Tondû, Glamorgan, any fresh beer, Burton ales, or "John Brothers" bitter or stout, or any wines or spirituous liquors other than such as should have been supplied by the plaintiffs.

By a first mortgage dated September 24, 1891, and made between John Jenkins, of the Tondû Arms, publican, of the one part, and M. A. Blankensee, L. H. Blankensee, and I. Silverston, of the other part, John Jenkins demised the Tondû Arms and other hereditaments to M. A. Blankensee, L. H. Blankensee, and I. Silverston for the residue of certain terms of eighty years and seventy-two years respectively (less the last two days thereof respectively), except the last ten days thereof respectively, by way of mortgage for securing the repayment of a sum of 1000*l.* with interest at the rate therein mentioned.

By a second mortgage of the same date, made between John Jenkins, of the one part, and Morgan John and William John, trading in copartnership as "John Brothers" at Abergarw, near Bridgend, Glamorgan, brewers and wine and spirit merchants, thereinafter styled as John Brothers, of the other part, in consideration of the sum of 550*l.* paid by John Brothers out of moneys belonging to them on their joint partnership account, John Jenkins demised the said hereditaments to John Brothers, to hold the same unto John Brothers, their executors, administrators, and assigns, for the residue of the said terms (less the last two days thereof respectively), except the last ten days thereof respectively, subject to the first mortgage, and subject to the proviso for redemption thereinafter contained. Provided that if John Jenkins, his executors, administrators or assigns, should pay to John Brothers on March 24 then next the said sum of 550*l.*, with interest at the rate therein mentioned, John Brothers would surrender the premises to John Jenkins, his executors, administrators or assigns, subject to the first mortgage. And it was declared that John Jenkins, his executors, administrators or assigns, should stand possessed of the last ten days of the said terms (less the last two days thereof respectively) in trust for John Brothers subject as aforesaid.

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And John Jenkins irrevocably appointed John Brothers, their executors, administrators, and assigns, to be his attorneys, and in his name and on his behalf to sign, seal, and deliver any deed of assignment of the said terms desired by John Brothers, their executors, administrators or assigns, subject as aforesaid. And John Jenkins covenanted with John Brothers, their executors, administrators or assigns, to pay to John Brothers on March 24 then next the said sum of 550*l.*, with interest at the rate therein mentioned. And if the said sum of 550*l.*, or any part thereof, should remain unpaid after that day, to pay to John Brothers, their executors, administrators or assigns, so long as the same sum or any part thereof should remain unpaid, interest at the rate aforesaid. And to keep the premises repaired and insured in the sum therein mentioned, and on demand produce to John Brothers, their executors, administrators or assigns, the policy and receipts for premiums. And if default were made in keeping the premises repaired or insured, it should be lawful for John Brothers, their executors, administrators or assigns, to put them in repair and insure them, and John Jenkins would on demand repay to John Brothers, their executors, administrators or assigns, all moneys expended for that purpose, with interest at the rate therein mentioned.

By a deed of covenant of the same date, made between John Jenkins of the one part and John Brothers, described as in the second mortgage, of the other part, after reciting the second mortgage, and that upon the negotiation for the loan of 550*l.*, and as a further consideration therefor not mentioned in the second mortgage, John Jenkins had agreed to execute this deed of covenant, it was witnessed that, in further consideration of the said loan, which John Jenkins acknowledged to be the case, and also that John Brothers were induced to and did make the advance upon John Jenkins agreeing to execute this deed of covenant, John Jenkins covenanted with John Brothers, their executors, administrators, and assigns, that he John Jenkins, his executors, administrators or assigns, did, for so long as he or they should remain, continue, and be in the possession and occupation of the Tondû Arms,

and the same should not be sold or disposed of under any of the powers in the mortgages thereof, and thereby John Jenkins, his executors, administrators or assigns, be forced to relinquish possession thereof, bind the Tondû Arms to John Brothers, for the entire supply for consumption, either on or off the said premises, of fresh beer, Burton ales, and "John Brothers" bitter and stout, at the prices therein mentioned. And John Jenkins further covenanted with John Brothers that he, his executors, administrators or assigns, would procure and purchase from them all wines and spirituous liquors sold out of, or consumed on or off, the said premises and supplied therefrom, he and they duly paying for the said beer at the before-mentioned prices, and wines and spirits on the usual trade terms. Provided that upon breach of either of the covenants John Brothers should be at liberty to take proceedings for the immediate payment of the moneys due on the second mortgage, and in addition thereto should be entitled to recover against John Jenkins a sum of money as and for liquidated damages not exceeding 1*l.* per barrel of beer or stout, and 10*s.* for every gallon of wines or spirits purchased or procured elsewhere. And John Jenkins further covenanted with John Brothers that he, his executors, administrators or assigns, would on demand pay the said sums as and for liquidated damages as aforesaid upon any breach of the said covenants. Provided that this deed of covenant and the covenants therein contained should not be binding on John Jenkins, his executors, administrators or assigns, for a longer period than fourteen years from the date thereof.

On September 26, 1892, John Jenkins gave John Brothers a further charge on the premises to secure a further advance of 100*l.*

At some time previous to the execution of the following underlease the first mortgage was transferred to John Thomas; the second mortgage and further charge and the benefit of the deed of covenant were transferred and assigned to the plaintiffs, a company that had purchased the businesses previously carried on by John Brothers, together with the premises belonging thereto, and the goodwill, debts, and assets thereof, including

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their right of supply to the Tondû Arms; and the equity of redemption was assigned to Evan Thomas. The registered office of the plaintiffs was situated at the Abergarw Brewery.

By an underlease dated September 22, 1896, and made between John Thomas (in whom the legal estate in the premises thereinafter demised was vested by way of mortgage) of the first part, Evan Thomas, of the Tondû Arms, innkeeper (being the person entitled to the equity of redemption of the said premises, and thereinafter called the lessor, which term when thereinafter used should where necessary be deemed to include the executors, administrators, and assigns of Evan Thomas), of the second part, and the defendant (thereinafter called the lessee) of the third part, in consideration of the rent and covenants thereinafter reserved and contained, and on the part of the lessee to be observed and performed, and also in consideration of the sum of 350*l.* to the lessor paid by the lessee (1) with the consent and approbation and by the direction of John Thomas, John Thomas demised and the lessor demised and confirmed unto the lessee the Tondû Arms for nine years from September 22 then instant at the rent therein mentioned. And the lessee covenanted with the lessor and with John Thomas (inter alia) to pay the rent, keep the premises in repair, and at the expiration of the term to surrender and yield up the premises unto the lessor (or John Thomas), and that it should be lawful for the lessor and John Thomas and the superior lessor to enter and examine the condition of the premises; and further, that the lessee would not build on the premises any dwelling-house or building other than the buildings then erected thereon without the consent of the lessor. And the lessee further covenanted with the lessor and with John Thomas that he would from the date of this underlease and during the continuance of the term thereby granted take of and purchase from the plaintiffs or their nominees all fresh beer, Burton ales, bitter beer, stout, wines, and spirits vended or consumed on the said premises at the prices in the schedule (being the same prices as in the deed of covenant). And in case the lessee should make default in the performance of the

(1) Vide Conveyancing Act, 1881, s. 18, sub-s. 6.

last-mentioned covenant he should forfeit or pay to the lessor as liquidated damages a sum of 1*l.* and so on in proportion for any greater or less quantity for every eighteen gallons in cask or bottle of beer, also ales, porter or stout, and a sum of 10*s.*, and so on in proportion for any greater or less quantity, for every gallon of wines and spirits he might purchase during the said term from any person other than the plaintiffs or their nominees.

On March 22, 1899, Evan Thomas gave six months' notice of his intention to pay off the second mortgage and further charge.

The defendant having bought, and intending to buy, beer, wines, and spirits from persons other than the plaintiffs, the plaintiffs issued a writ in the present action on April 27, 1899.

At the expiration of the six months' notice to pay off, the money was duly tendered by Evan Thomas and refused by the plaintiffs.

The defendant denied the breach of covenant, and relied on the above notice and tender, pleading that he had offered and was always ready to pay the plaintiffs the principal, interest, and costs due to them or to John Brothers under the second mortgage and further charge upon a transfer of the same to him, and that Evan Thomas was willing that the transfer should be effected.

Warrington, Q.C., and *Edward Ford*, for the plaintiffs. The deed of covenant was a further security for the second mortgage, and the tie is binding until that mortgage is redeemed. Reading the two deeds together, it is clear that the benefit of the covenant was assignable, and the plaintiffs are, therefore, entitled to enforce it. It is still subsisting, as Evan Thomas, an assign of John Jenkins, is in possession by his tenant, the defendant. The underlease was made by Evan Thomas, the mortgagor in possession, John Thomas, the first mortgagee, merely joining to pass the legal estate. The defendant, having notice of the restrictive covenant, as is shewn by the similar covenant in the underlease, is bound by it in equity, though he is an underlessee and not strictly an assign: *Tulk* v. *Moxhay*. (1)

(1) (1848) 2 Ph. 774.

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P. O. Lawrence, Q.C., and *S. T. Evans*, for the defendant. The benefit of the covenant was not assignable, as it only bound the Tondû Arms to John Brothers, and not to their "successors and assigns." The absence of the words "successors and assigns" distinguishes the present case from *Doe* v. *Reid* (1), *Clegg* v. *Hands* (2), and *White* v. *Southend Hotel Co.* (3)

Secondly, the covenant was only intended to bind assigns of John Jenkins, and the defendant, being an underlessee, is not an assign: *Bryant* v. *Hancock & Co.* (4)

Thirdly, the defendant holds under John Thomas, the first mortgagee, who was not an assign of John Jenkins, and whose title is paramount to that of the plaintiffs. There is an express demise by John Thomas, and the fact that Evan Thomas, the mortgagor in possession, also demises and confirms, and is called the lessor, does not interfere with the former demise: *Roach* v. *Wadham.* (5)

Warrington, Q.C., in reply. The benefit of the covenant was intended to run with the business. In the second mortgage, the expressions "John Brothers" and "John Brothers, their executors, administrators, and assigns," are used without distinction, and the expression "John Brothers" must be read in the same way in the deed of covenant.

Secondly, in *Bryant* v. *Hancock & Co.* (4) a lessee who had covenanted for his assigns was held not liable for a breach by an underlessee. The decision does not affect the present case. The plaintiffs are not suing at common law, and an underlessee with notice of restrictive covenants is bound in equity: *Hall* v. *Ewin.* (6)

Thirdly, the defendant must be taken to hold under the better title: *Roach* v. *Wadham.* (5) The mortgages were both subsequent to the Conveyancing Act, 1881 (44 & 45 Vict. c. 41), and the underlease by the mortgagor in possession gives a better title than that by the first mortgagee not in possession.

(1) (1830) 10 B. & C. 849; 34 R. R. 584.
(2) (1890) 44 Ch. D. 503.
(3) [1897] 1 Ch. 767.
(4) [1898] 1 Q. B. 716; [1899] A. C. 442.
(5) 6 East, 289.
(6) (1887) 37 Ch. D. 74.

KEKEWICH J., after holding that if the covenant bound the defendant he had broken it, but that, as he had by his pleading virtually offered to redeem the plaintiffs' mortgage during the continuance of which the covenant was alone binding, it would be wrong to grant an injunction simply, though possibly a complicated order granting an injunction in default of redemption within a specified time could be framed, continued:—

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I have now to deal with some neat questions of law. In the first place, the defendant puts his case in this way: "John Jenkins covenanted to purchase his beer, wines, and spirits from John Brothers. I am sued by a limited company, viz., the plaintiffs, to whom I am not tied." That contention depends on the form and construction of the covenant in question. This covenant is in a separate deed contemporaneous with the second mortgage and intended to form part of it, and the two documents must be read together.

The covenant was to purchase beer, wines, and spirits from John Brothers without the addition of the words "their successors and assigns." Now, the cases cited shew that those words are important, and their insertion in any particular case is a strong indication of an intention to give the successors and assigns the benefit of the covenant. But the words are not essential, as that intention may be gathered from other indications. The absence of those words in the present case is unimportant, the draftsman having shewn a clear intention that the benefit of the covenant should go to the persons for the time being carrying on the business of John Brothers at Abergarw. In the deed of covenant the partners are made parties of the second part, and described as "Morgan John and William John, trading in copartnership as 'John Brothers: at Abergarw, near Bridgend, Glamorgan, brewers, and wine and spirit merchants, hereinafter styled as John Brothers." If the forms of conveyancing had enabled the draftsman to do so, he would have made the firm a party and said, "which firm now consists of Morgan John and William John." No such form, however, could have been adopted, and therefore the draftsman made the partners parties and referred to them by their firm name of John Brothers in the subsequent parts of the deed.

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The firm name is used throughout both deeds. The money was advanced by the firm out of moneys belonging to them on their joint partnership account, and the Tondû Arms was tied to their business. The covenant must be regarded as having been made for the benefit of the business. Conveyancing forms do not admit of a covenant being entered into with a business, but this is what the draftsman has attained in another way. On the next day after the execution of the deed of covenant a new partner might have joined the firm, and, if the defendant's argument is sound, there would have been an end of the covenant, as the new firm being a different firm would not have been entitled to the benefit, and Morgan John and William John could not have enforced it for their own benefit, because they were no longer trading by themselves as John Brothers. I lay no stress on the fact that the firm has merely been converted into a company. That is quite as much an assignment of the business as if it had been assigned to strangers. But I hold that the persons entitled to the business are entitled to the benefit of the covenant, and on the first point I am against the defendant.

In the second place, the defendant contends that he is not an assign of John Jenkins. The equity of redemption in the Tondû Arms became vested in Evan Thomas, and the defendant is not his assign, but his underlessee. But is he not a person intended to be bound by the covenant? The covenant binds John Jenkins, his executors, administrators, and assigns "so long as he or they shall remain, continue, and be in the possession and occupation of the Tondû Arms, and the same shall not be sold or disposed of under any of the powers in the mortgages thereof, and thereby John Jenkins, his executors, administrators or assigns, be forced to relinquish possession thereof." Why is the defendant not one of the persons intended to be bound by the covenant? If that was the intention, the defendant clearly can be bound as claiming under John Jenkins with notice, and it is not contended that the mere fact that he is an underlessee will assist him if the doctrine of *Tulk* v. *Moxhay* (1) is applicable. *Hall* v. *Ewin* (2)

(1) 2 Ph. 774. (2) 37 Ch. D. 74.

is conclusive on that point. The only question is whether the defendant was intended to be bound. In my opinion, every one claiming under John Jenkins was intended to be bound. *Bryant* v. *Hancock & Co.* (1) is not much in point, but it shews that the word "assign" does not necessarily exclude an underlessee. Whether it does so or not is a question of intention in each case. In the present case I think the covenant was intended to bind the premises in the hands of any one claiming through John Jenkins.

The third and most difficult question is whether the defendant does claim through John Jenkins. It appears that John Jenkins, having executed two mortgages, the former of which is now vested in John Thomas and the latter in the plaintiffs, assigned the equity of redemption to Evan Thomas. The defendant does not claim through John Brothers or the plaintiffs, but through John Thomas, the first mortgagee, and Evan Thomas, the owner of the equity of redemption subject to John Thomas's first mortgage, and to the plaintiffs' second mortgage. The defendant says: "I am an underlessee of the first mortgagee, and consequently I am not bound by the covenants made by John Jenkins with the second mortgagees. My title is paramount to the second mortgage." This argument is sound if the title ought to be deduced from the first mortgagee. The frame of the underlease is peculiar. The plaintiffs, the second mortgagees, are not parties to it, but s. 18, sub-s. 1, of the Conveyancing Act, 1881, enables the mortgagor in possession to grant a lease valid against every incumbrancer, and the validity of this underlease is not questioned. Sub-s. 2 gives a corresponding power to the mortgagee in possession. The underlease being admittedly a valid lease by the mortgagor in possession, the question is whether he or John Thomas, the first mortgagee, is to be regarded as the lessor. The underlease is made between John Thomas, "in whom the legal estate in the premises hereinafter demised is vested by way of mortgage," of the first part, Evan Thomas, "being the person entitled to the equity of redemption of the said premises, and hereinafter called the lessor," of the second part, and the

(1) [1898] 1 Q. B. 716; [1899] A. C. 442.

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defendant, "hereinafter called the lessee," of the third part. The fact that Evan Thomas is described as the lessor is not in itself very important. It is then witnessed that in consideration of the rent and covenants, and also in consideration of moneys paid to the lessor by the lessee with the consent of John Thomas, "John Thomas doth hereby demise, and the lessor doth hereby demise and confirm unto the lessee," the premises in question. This is very strange conveyancing. *Roach* v. *Wadham* (1), however, shews that the description of the parties is immaterial, and that the grantee must be considered to hold under the better title. In the present case, it seems to me that Evan Thomas, the mortgagor in possession, was the only person who could make a good title. John Thomas, the first mortgagee, not being in possession, could not do so. The defendant now contends that it is more convenient for him to hold under John Thomas, as he would be free of the covenant, and that the frame of the underlease shews it was so intended. But I find no indication of any such intention in the underlease, and I must fall back on the rule that the grantee holds under the better title. I am, therefore, against the defendant on this point, and hold that he is liable to perform the covenant. There will be a declaration that the defendant, while in possession or occupation of the Tondû Arms, and until the redemption of the plaintiffs' mortgage and further charge, is bound by the covenant, but that after redemption the covenant is no longer binding.

Solicitors: *Wrentmore & Son, for S. H. Stockwood, Bridgend Glamorgan; Smiles & Co., for T. H. Belcher, Cardiff.*

(1) 6 East, 289.

G. R. A.

BYRNE J.
1899
Nov. 29.

In re RAYBOULD.
RAYBOULD *v.* TURNER.

[1898 R. 1903.]

Administration—Trustee carrying on Business — Tort — Damages against Trustee—Right of Trustee to Indemnity—Subrogation.

A trustee carried on his testator's colliery business, and in so doing let down the surface of the land and injured the buildings of an adjoining owner, who recovered damages against the trustee personally for 1092*l.* and costs. The adjoining owner then claimed to be entitled to be paid direct out of the testator's estate the amount so recovered :—

Held, following *Benett* v. *Wyndham*, (1862) 4 D. F. & J. 259, that, as the injury had been occasioned by the trustee in the reasonable management and working of his testator's estate, he was entitled to be indemnified out of the assets, and, consequently, that the adjoining owner was entitled to stand in the place of the trustee and to claim the benefit of this right to indemnity so as to obtain payment of the damages and costs so recovered direct out of the testator's estate.

ADJOURNED SUMMONS.

This was an application for payment of a sum of 1092*l.* and costs out of the estate of the above-named testator, Thomas Raybould, which raised the question of the liability of a testator's estate for the tort of a trustee and executor.

The facts, so far as material for the purposes of this report, were as follows :—

Cornelius Chambers, the surviving trustee and executor of the above-named testator, in 1892 commenced working one of the testator's collieries, and in so doing he let down the surface of the land, and injured the buildings and machinery of an adjoining owner, Messrs. Roberts & Cooper.

In December, 1898, Messrs. Roberts & Cooper recovered judgment against the trustee, in an action in the Queen's Bench Division, for the amount found by a special referee for damages, together with the costs of the action. The special referee had assessed the damages at 1092*l.*, and Messrs. Roberts & Cooper now claimed to be entitled to be paid this amount and the costs directly out of the testator's estate, and took out this summons for the purpose of enforcing this claim.

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The colliery had been worked for the benefit of the estate; the evidence as to the method of working was conflicting; though the Court ultimately held that the working had been reasonable and not improper, having regard to the engineering advice obtained by the trustee.

Romer, for Messrs. Roberts & Cooper. The trustee is entitled to be indemnified out of the testator's estate against any personal liability he has incurred in the proper management of the testator's business; in the course of this working the trustee has become subject to a legal liability to a third party, and against this he is entitled to be indemnified out of the estate: *Benett* v. *Wyndham*. (1) The trustee being thus entitled to indemnity, the adjoining owner is not obliged to put in execution against the trustee, but can be paid direct out of the estate, having the same claim against the assets as the trustee has: *In re Blundell* (2); *Dowse* v. *Gorton*. (3) The evidence shews that the colliery was properly worked, under proper advice, and in the usual way.

Stewart-Smith, for the trustee, claimed the right to be indemnified out of the assets, and adopted the argument adduced on behalf of the adjoining owner on this point.

Rowden, Q.C., and *Martelli*, for creditors protecting the testator's estate. Primâ facie, letting down the surface implies reckless working; and we say the evidence shews that the working was not carefully done: if this is so, the trustee is not entitled to be indemnified. But, assuming that the working was reasonable and proper, still the trustee is not entitled to be indemnified against these damages. The principle of *Dowse* v. *Gorton* (3) cannot be applied to indemnity for damages for a tort; there is no privity between the third person claiming against the trustee and the trust estate. *Dowse* v. *Gorton* (3) was a peculiar case, and its principle is not to be extended: it would be a mischievous principle if any person with whom a trustee had incurred a liability could get at the assets direct: *Worrall* v. *Harford* (4); Lewin on Trusts, 10th ed. p. 758.

(1) 4 D. F. & J. 259.
(2) (1890) 44 Ch. D. 1.
(3) [1891] A. C. 190.
(4) (1802) 8 Ves. 4.

[They also referred to *In re Johnson.* (1)]

Romer, in reply. *Dowse* v. *Gorton* (2) is only an illustration of the principle for which I am contending—a principle that is much older than that case; it is not a question of contract: when once the trustee is entitled to indemnity, then by subrogation I can stand in his place and am entitled to be paid direct out of the assets.

BYRNE J. This is not an easy case, and it is not made easier by the state of the evidence, which is somewhat conflicting.

The first question I have to consider is whether the same principle ought to be applied to the case of a trustee claiming a right to indemnity for liability for damages for a tort, as is applied to the simpler case of claims made against a trustee by ordinary business creditors, where they have been allowed the benefit of his right to indemnity, by proving directly against the assets: the kind of case of which *Dowse* v. *Gorton* (2) is a recent illustration. It has been argued that there is no authority to justify me in holding that, where damages have been recovered against a trustee in respect of a tort, the person so recovering can avail himself of the trustee's right to indemnity, and so go direct against the trust estate; but the authority of *Benett* v. *Wyndham* (3) goes to shew that if a trustee in the course of the ordinary management of his testator's estate, either by himself or his agent, does some act whereby some third person is injured, and that third person recovers damages against the trustee in an action for tort, the trustee, if he has acted with due diligence and reasonably, is entitled to be indemnified out of his testator's estate. When once a trustee is entitled to be thus indemnified out of his trust estate, I cannot myself see why the person who has recovered judgment against the trustee should not have the benefit of this right to indemnity and go direct against the trust estate or the assets, as the case may be, just as an ordinary creditor of a business carried on by a trustee or

(1) (1880) 15 Ch. D. 548, 552. (2) [1891] A. C. 190.
(3) 4 D. F. & J. 259.

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executor has been allowed to do, instead of having to go through the double process of suing the trustee, recovering the damages from him, and leaving the trustee to recoup himself out of the trust estate. I have the parties interested in defending the trust estate before me, and I have also the trustee, and he claims indemnity, and, assuming that a proper case for indemnifying him is made out by the evidence, I think his claim should be allowed.

The next question I have to decide is whether this trustee has worked the colliery in such a way as to be entitled to be indemnified. Having considered all the evidence, I am not prepared to say that the injury done to the applicants' land was occasioned by reckless or improper working, or otherwise than by the ordinary and reasonable management of the colliery; and I therefore come to the conclusion that the trustee is entitled to be indemnified out of the assets against the damages and costs which he has been ordered to pay to Messrs. Roberts & Cooper. It follows, therefore, for the reasons already given, that Messrs. Roberts & Cooper are entitled to stand in the trustee's place for the purpose of obtaining this indemnity direct from this testator's estate. The result, therefore, is that this summons succeeds.

Solicitors: *Robbins, Billing & Co., for W. Waldron, Brierley Hill; Walker & Rowe; R. H. Bentley, for S. Ward, Dudley.*

W. C. D.

EARLE *v.* KINGSCOTE.

BYRNE J.

1899

Nov. 23, 24, 25; *Dec.* 1.

[1898 E. 1305.]

Husband and Wife—Wife's Tort—Contract—Liability of Husband.

In July, 1898, the defendant G. K., the wife of the defendant H. K., requested the plaintiff to join her in the purchase of some shares, and asked her to raise a sum of 2000*l.* to be invested in the purchase of the shares, holding out as an inducement to the plaintiff that she would by means of the investment be able in three months to repay the plaintiff the sum of 5300*l.* which she then owed her. The plaintiff agreed to raise the 2000*l.* when the shares had been purchased. Shortly afterwards the plaintiff, relying on the representation of the defendant G. K. that she had bought the shares, signed two promissory notes for 1000*l.* each, and, her solicitor having discounted them, paid the proceeds to the said defendant, and the plaintiff paid the notes on maturity.

The defendant G. K. never in fact purchased the shares.

In an action for damages by the plaintiff against the defendant G. K. and her husband:—

Held, that the contract was effected prior to and independently of the fraud complained of, and that the fraud was not the means of effecting the contract in the sense in which that expression is used in *Liverpool Adelphi Loan Association* v. *Fairhurst*, (1854) 9 Ex. 422, and that on the authority of that case and of the case of *Wright* v. *Leonard*, (1861) 11 C. B. (N.S.) 258, the husband was liable in damages for his wife's deceit.

In July, 1898, the plaintiff was requested by the defendant Georgiana Kingscote to join her in the purchase of some shares, and was asked by the said defendant to raise a sum of 2000*l.* to be invested in the purchase thereof, one half of the shares being for the plaintiff and the other half for the said defendant, who offered to be responsible for any loss that might be incurred by the plaintiff, and agreed that her own moiety should be charged with any loss accruing to the plaintiff.

The plaintiff was at first unwilling to entertain the said proposal, but on the representation by the defendant Georgiana Kingscote that she would by the investment in the shares be able in three months to repay a sum of 5300*l.* due from her to the plaintiff, the plaintiff consented to find or raise by promissory notes the sum of 2000*l.* in order to pay for the shares when purchased.

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On July 23, 1898, the defendant Georgiana Kingscote telegraphed to the plaintiff that she had bought the shares, and that it (meaning the investment) was a "real good thing," and on July 25 she again telegraphed to the plaintiff to direct her solicitor to let the said defendant have 2000*l.* on the plaintiff's guarantee, at the same time requesting her not to mention the shares to him, and also stating that it was the last day for completing the purchase of the shares. Thereupon on the same day the plaintiff, relying on the representations of the defendant Georgiana Kingscote that she had bought the shares, and that the sum of 2000*l.* was required on that date to complete the purchase, telegraphed as requested to her solicitor, and signed and posted two promissory notes each for the sum of 1000*l.*, payable to her solicitor, who discounted them, and paid the proceeds to the defendant Georgiana Kingscote for the sole purpose of paying for the shares. The notes became due on October 28, 1898, and the plaintiff thereupon paid the amount due thereon and took them up.

The plaintiff having applied to the defendant Georgiana Kingscote for particulars of the shares, and the defendant having refused to give the information asked, this action was commenced against her in order to protect the interests of the plaintiff in the shares, claiming a declaration that the defendant Georgiana Kingscote held the shares upon trust as to one moiety for the plaintiff, and as to the other moiety charged with repayment to the plaintiff of the balance of any loss and expenses in respect of the notes and interest, and that she was bound to indemnify the plaintiff against all losses incurred in respect of the notes and shares, and for an injunction to restrain the said defendant from parting or dealing with the shares. In opposition to a motion for an injunction, the defendant Georgiana Kingscote swore an affidavit in which she alleged that she had never purchased any shares at all with the said moneys. The defendant Howard Kingscote was then made a co-defendant by amendment. The plaintiff by her statement of claim alleged that if the allegation in the affidavit was true it was contrary to the statements made to the plaintiff, and that the defendant Georgiana Kingscote had wilfully and with the intent to

deceive the plaintiff made a false and fraudulent representation that she had purchased the shares, in order to induce the plaintiff to raise and advance the sum of 2000*l.*, and that the plaintiff had been thereby deceived and induced to raise and advance the same. It was not at the trial alleged that the defendant Howard Kingscote had any knowledge of the circumstances attending the advance, or had ratified his wife's actions, or had participated in the use of the moneys, but the plaintiff claimed that he was liable to her for the sum advanced, expenses and interest, and in damages.

While the above-mentioned motion was proceeding, 500*l.* had been paid on account, but no further sum had been paid.

The above facts were admitted, and the question was whether the defendant Howard Kingscote was liable for his wife's tort under the circumstances above set out. It was agreed that the question was one of common law and was not affected by the Married Women's Property Acts: see *Seroka* v. *Kattenburg* (1); it was also agreed that judgment should be entered against the wife for 1500*l.* and costs in the form as settled by the Court in *Scott* v. *Morley*. (2)

Levett, Q.C., and *W. Baker*, for the plaintiff. A married woman is incapable of binding herself by a contract. She is, however, responsible for all torts committed by her during coverture, and the husband must be joined as a defendant, and consequently they are liable for frauds committed by her as for other personal wrongs; but when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife: *Liverpool Adelphi Loan Association* v. *Fairhurst* (3); *Wright* v. *Leonard*. (4) In the present case the contract was entered into prior to the fraud and entirely independent of it, and the fraud was not the means of effecting the contract.

The same rule of law applies to an infant as well as to a feme covert. Thus an infant has been held not liable for over-

(1) (1886) 17 Q. B. D. 177.
(2) (1887) 20 Q. B. D. 120.
(3) 9 Ex. 422.
(4) 11 C. B. (N.S.) 258.

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riding a horse which he had hired: *Jennings* v. *Rundall* (1); but where an infant hired a horse and was told at the time of hiring him not to jump him and did jump him, and so injured him, he was held liable: *Burnard* v. *Haggis*. (2) No doubt in that case the tort was connected with the contract, but was not the means of effecting (in the sense of obtaining) the contract. We submit that the defendant Howard Kingscote is liable to the plaintiff for his wife's tort.

[They also referred to *Catterall* v. *Kenyon* (3); *Wainford* v. *Heyl* (4); *In re Seager* (5); *Cooper* v. *Witham* (6); *Bristow* v. *Eastman* (7); Bullen & Leake on Pleading, 3rd ed. p. 339.]

W. Whately, for the wife.

Latham, Q.C., and *Elgood*, for the husband. We submit that the husband is not liable in damages for his wife's tort. Though the contract was entered into prior to the fraud, yet the fraud was part and parcel of the same transaction; if she had not entered into the contract she would not have committed the fraud; therefore, according to *Liverpool Adelphi Loan Association* v. *Fairhurst* (8) and *Wright* v. *Leonard* (9), the wife cannot be responsible for the fraud, and the husband be sued for it together with the wife.

Levett, Q.C., in reply.

Cur. adv. vult.

Dec. 1. BYRNE J. The common law affecting the point I have to decide is thus stated in *Liverpool Adelphi Loan Association* v. *Fairhurst* (10): "A feme covert is unquestionably incapable of binding herself by a contract; it is altogether void, and no action will lie against her husband or herself for the breach of it. But she is undoubtedly responsible for all torts committed by her during coverture, and the husband must be joined as a defendant. They are liable, therefore, for frauds committed by her on any person, as for any other personal

(1) (1799) 8 T. R. 335; 4 R. R. 680.
(2) (1863) 14 C. B. (N.S.) 45.
(3) (1842) 3 Q. B. 310.
(4) (1875) L. R. 20 Eq. 321.
(5) (1889) 60 L. T. 665.
(6) (1668) 1 Lev. 247; 1 Sid. 375.
(7) (1794) 1 Esp. 172; 5 R. R. 728.
(8) 9 Ex. 422.
(9) 11 C. B. (N.S.) 258.
(10) 9 Ex. 429.

wrongs. But when the fraud is directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction, the wife cannot be responsible, and the husband be sued for it together with the wife."

In *Wright* v. *Leonard* (1) Willes J., who delivered the judgment of Williams J. and himself, states the law as follows (2): "As a general rule, a married woman is answerable for her wrongful acts, including frauds, and she may be sued in respect of such acts jointly with her husband, or separately if she survives him. The liability is hers, though, living with the husband, it must be enforced in an action against her and him, which, to charge him, must be brought to a conclusion during their joint lives. Inasmuch, however, as she is not liable upon her contracts, the common law, in order effectually to prevent her being indirectly made so liable under colour of a wrong, exempts her from liability even for fraud, where it is 'directly connected with the contract with the wife, and is the means of effecting it, and parcel of the same transaction.' Such was the decision of the Court of Exchequer in *Liverpool Adelphi Loan Association* v. *Fairhurst*. (3) This is the extreme length to which the exemption has been carried in any decided case; and we do not consider ourselves entitled, upon grounds of supposed policy only, to infringe further upon the general rule of law. We ought also to add that this exception, in favour of fraud accompanying a contract, does not, so far as we have been able to discover, exist in the civil law, nor in the law administered in the Court of Chancery, nor in that of Scotland." I have read this last passage for the sake of the expression "in favour of fraud accompanying a contract."

Erle C.J. and Byles J. were of opinion that the representation made by the married woman was in its nature more fit to be classed with contracts than with wrongs, and in this respect they differed with the other judges, but they did not in any way dissent from the general proposition or from the law as laid down in the earlier case. Erle C.J., indeed, cites it as an authority. The latter judge saw no reason for limiting the

(1) 11 C. B. (N.S.) 258. (2) 11 C. B. (N.S.) 266.
(3) 9 Ex. 422, 429.

BYRNE J. 1899 EARLE v. KINGSCOTE.

exemption of the husband from liability to the particular case in question in *Liverpool Adelphi Loan Association* v. *Fairhurst* (1), but it will be noticed that Willes J. expresses the view that he and Williams J. did not consider themselves entitled upon supposed grounds of policy only to infringe further upon the general rule of law.

Although an infant is liable for a tort, yet an action grounded on contract cannot be changed into an action of tort. Thus an infant has been held not liable for overriding a horse which he had hired: *Jennings* v. *Rundall* (2); but where an infant had hired a horse and was expressly told not to jump him and did so and injured him, he was held liable, as it was just as much a tort as if he had taken the horse out of the plaintiff's stable without leave: *Burnard* v. *Haggis*. (3)

It will be noticed in the last case that the wrong would never have been committed but for the contract, and so may be said in a sense to have been connected with it, and perhaps parcel of the same transaction, yet it was not the means of effecting (in the sense of obtaining) the contract.

I am of opinion that the cases in which the husband is to be held exempt from his common law liability for his wife's torts must be limited to cases in which the fraud is not only directly connected with the contract, and parcel of the same transaction, but is also the means of effecting (in the sense of obtaining) the contract, and that, without disregarding the observation I have mentioned of Erle C.J. in *Wright* v. *Leonard* (4), I ought to follow the clearly expressed view of Willes J. and Williams J., and avoid infringing further upon the general law than is justified by the authority of *Liverpool Adelphi Loan Association* v. *Fairhurst*. (1)

In the present case the contract was effected prior to and independently of the fraud complained of, and I find myself unable to say that the fraud was the means of effecting the contract in the sense in which that expression is in my opinion used in the statement of the law I have quoted from *Liverpool Adelphi Loan Association* v. *Fairhurst*. (1)

(1) 9 Ex. 422.
(2) 8 T. R. 335; 4 R. R. 680.
(3) 14 C. B. (N.S.) 45.
(4) 11 C. B. (N.S.) 258.

It follows that in this case I consider that the defendant Howard Kingscote is liable in damages for the tort complained of.

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Solicitors: *Fraser & Christian; Powell & Burt.*

G. M.

In re OVERWEG.
HAAS *v.* DURANT.

[1898 O. 1793.]

BYRNE J. 1899 *Nov.* 30; *Dec.* 1, 2, 6.

Stockbroker—Continuation Account—Death of Principal—Contracts for Sale and Repurchase after Death—Liability of Stockbroker for Loss.

Where a stockbroker having a continuation account with a client, on the death of the client, instead of closing the account immediately, upon his own authority enters into a fresh continuation and ultimately effects a sale of the securities at a loss, he is liable for the loss so incurred.

THE plaintiff was employed by Charles Overweg as his stockbroker, and on March 9, 1898, by his directions carried over for him on the London Stock Exchange and in accordance with the rules and regulations thereof, to be paid for on the 30th of that month, certain stocks and shares, including 10,000*l.* new bonds of the Republic of Ecuador.

Charles Overweg died on March 24, 1898, and the plaintiff was informed of the fact on the following day, and endeavoured to obtain instructions from the representatives of Overweg as to what was to be done with the stocks and shares; but, failing to obtain any instructions, he, on March 28, 1898, entered into fresh carrying-over contracts for the respective stocks and shares, including the Ecuador bonds, for the next settling day, the contract for sale with respect to the Ecuador bonds being at 21½, and the contract for repurchase at the same price plus 6 per cent. contango.

The plaintiff having been informed that a meeting of the creditors of Overweg was to be held on April 29 in consequence of his estate being insufficient to answer his liabilities, he at once sold the stocks and shares other than the Ecuador bonds,

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for which he was then unable to find a purchaser, and again was obliged to carry them over. These bonds he sold on April 29 at the price of 19.

As the result of these transactions there was a balance in the plaintiff's favour of 383*l.* 12*s.* 3*d.*

This action was commenced by Julius Haas, on behalf of himself and all other the creditors of Charles Overweg, against the administrator of Overweg's estate, and this was a summons by the plaintiff, who claimed to be a creditor on the estate, for the above sum of 383*l.* 12*s.* 3*d.*, for a declaration that the claim was a good one and ought to be allowed by the defendant, and that the defendant might be ordered to pay that sum to the plaintiff.

G. Cave, for the plaintiff. The plaintiff acted as he thought in the best manner for the estate. If he had sold at any time between March 28 and April 29 the price obtained for the bonds would have been much lower.

The sale ought not to be regarded as a true sale, but as a nominal sale only, involving no accountability on the part of the broker; and the broker if liable at all ought only to be held answerable in damages for the loss which could be shewn to have arisen by reason of the continuation and ultimate sale.

Levett, *Q.C.*, and *Danckwerts*, for the defendant. On the death of Overweg any authority express or implied to the plaintiff to effect a continuation expired: *Phillips* v. *Jones* (1); and he ought to have closed the account at once. A continuation is in form and in law a sale and repurchase, or repurchase and sale, as the case may be: *Bongiovanni* v. *Société Générale* (2); and we submit that the plaintiff is liable for the loss incurred, and that the summons ought to be dismissed with costs.

Cave, in reply.

Cur. adv. vult.

Dec. 6. BYRNE J. Julius Haas acted as broker for Charles Overweg, who died on March 24, 1898. On that day he was under contract, as the result of a continuation transaction, to

(1) (1888) 4 Times L. R. 401. (2) (1886) 54 L. T. 320.

take up and pay for on March 30 (amongst other securities) 10,000*l.* New Ecuador bonds. The next settling day after the death was March 28.

Upon the death of Overweg any authority express or implied to Haas as his broker to effect a continuation determined: *Phillips* v. *Jones* (1); and Haas was entitled immediately upon the death to sell. In fact, on the following settling day, March 28, he carried over, that is to say, he effected a fresh continuation, by entering into a contract for sale at 21½, and a contract for repurchase on the next settlement at 21½ plus 6 per cent. contango.

This is the ordinary method of carrying over, and it was argued that the sale ought not to be regarded as a true sale, but as a nominal sale only, not involving accountability on the part of the broker unless on the footing of accepting the contract for repurchase also, and that the broker if liable at all ought only to be held answerable in damages for the loss which could be shewn to have arisen by reason of the continuation and ultimate sale actually effected.

But, as is shewn by the case of *Bongiovanni* v. *Société Générale* (2), a continuation really is in form and in law a sale and repurchase, or purchase and resale, as the case may be, and, notwithstanding the fact that there is some evidence to shew that upon a sale "simpliciter" a smaller amount would perhaps have been realized, I do not think that the broker can be heard to say that the sale ought not as between himself and his principal to be treated as a sale because he without authority at the same time entered into a contract to purchase again at the next settlement.

Under rule 70 of the Stock Exchange Rules, all continuations shall be effected at the making-up price, or at the then existing market price; and in the present case, as appears by the affidavit of Mr. Haas, the transaction was effected at the making-up price, which I apprehend may be taken to represent as nearly as may be the market value of the securities.

If he had been so minded, Mr. Haas could have closed the account on March 28 by selling in the market, relying upon

(1) 4 Times L. R. 401. (2) 54 L. T. 320.

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OVERWEG, *In re.* HAAS *v.* DURANT.

his right to indemnity against the estate of his principal in respect of any loss, but he preferred to sell in a different way. I have not to consider the question whether or not the legal personal representative could have elected to adopt the continuations actually effected and the ultimate sale at a later date had it been to his interest to do so, inasmuch as he elects to stand by the contract for sale entered into on March 28, 1898.

It appears to me, therefore, that the plaintiff fails in his contention, and he must pay the costs.

Solicitors: *L. S. Gregson; Goldberg, Langdon, Barrett & Newall.*

G. M.

RICE *v.* NOAKES & CO.

COZENS-HARDY J.

1899

Nov. 13, 16.

[1898 R. 1943.]

Mortgage—Clog on Redemption—"Tied" Public-house.

A mortgage of a leasehold public-house to a brewing company prohibited the mortgagor and persons deriving title under him from selling on the premises during the leasehold term malt liquors not purchased from the company.

The mortgagor was willing to pay off all the moneys secured on having a reconveyance or transfer free of the "tie" in respect of the sale of liquors:—

Held, that he was so entitled, as the "tie," though valid during the continuance of the security, could not be maintained when all moneys due upon the security had been paid off.

Biggs v. *Hoddinott*, [1898] 2 Ch. 307, and *Santley* v. *Wilde*, [1899] 2 Ch. 474, distinguished.

THE plaintiff, a licensed victualler, in October, 1897, became the purchaser of property at Camberwell, including a public-house known as the King's Arms, held upon lease for a term expiring at Christmas, 1923.

Prior to his purchase the defendants, Noakes & Co., Limited, brewers, had a mortgage on the property, the terms of which were practically identical with those of the mortgage of 1897 mentioned below. The defendants were not the vendors, but they released their security in order to enable Messrs. Nicholson, the second mortgagees, to sell to the plaintiff for 6800*l.*

As is usual, the plaintiff only found a small portion of the cash, the defendants, the brewers, advancing 4850*l.* on a first mortgage. This mortgage was dated October 7, 1897. It recited that the defendants had agreed to lend to the plaintiff the sum of 4850*l.* upon having the repayment thereof and of such other moneys as were thereinafter mentioned secured in manner thereinafter appearing; and it was witnessed that, in consideration of 4850*l.* then lent to the plaintiff by the defendants and for securing the payment to the defendants of the said principal sum and all such further sums as thereinafter

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mentioned, the plaintiff demised and conveyed to the defendants the leasehold premises, and all trade and tenant's fixtures, and the goodwill of the business of a licensed victualler or other business carried on upon the said premises, and the full benefit and advantage of all certificates and the magistrates' and Excise licences for carrying on such business or relating to the said premises, to hold to the defendants subject to a power of redemption therein contained. By this proviso it was declared that, if the plaintiff should, either on demand by the defendants left at the demised messuage, or without such demand, pay to them all such principal moneys and interest as were respectively mentioned in the covenant for payment thereinafter contained, and as should then be due on that security, then the defendants would, at the request and cost of the plaintiff, surrender or reconvey the premises to the plaintiff or as he should direct, and (after attorning tenant at a peppercorn rent if demanded) the plaintiff covenanted with the defendants that he would on demand pay to them the said principal sum and interest at 5 per cent. until payment, and all such further sums as should be due from the plaintiff, as well for money advanced to or for the use of the plaintiff, or paid on his behalf as therein mentioned, or on any other account or otherwise howsoever, with interest at the rate aforesaid, as also for goods sold and delivered by the defendants to the plaintiff. After other provisions the deed continued as follows: "And for the considerations aforesaid the mortgagor, so as to charge the premises . . . . hereby demised into whosesoever possession the same may come, whether by act of the party or by operation of law or by any other ways or means however, and to the further intent that the obligation of this covenant may run with the land, doth hereby covenant with the company that the mortgagor shall not, nor will at any time during the continuance of the term aforesaid, and whether any principal moneys or interest shall or shall not be owing upon the security of these presents, use or sell, or permit to be used or sold, in, upon, or about the said demised premises any malt liquors except such as shall be bonâ fide purchased by the mortgagor of the company. And, further, that, if and whenever there shall be a breach of the

said covenant, he, the mortgagor, shall and will pay to the company the sum of 1000*l.* as and for ascertained liquidated damages for each such breach, and will sell all such malt liquors pure, unadulterated, and unmixed, and of the like strength, character, and quality in all respects as the same shall be supplied to him." The deed also declared that the words "the mortgagor" and "the company," except when otherwise controlled by the context, should, throughout the deed, include all persons deriving title under them respectively.

The plaintiff was willing to pay off all money due to the defendants under the mortgage, and required them, on payment being made, to reconvey the leasehold property to him, and to release him from the covenant by which the house purported to be "tied" to the defendants during the whole currency of the lease, or to transfer the mortgage to him and assign the benefit of the covenant.

The defendants were willing to reconvey or transfer, but not to release or assign the covenant, and the present action was brought to obtain a declaration that the plaintiff was entitled, not only to reconveyance or transfer, but also to a release or assignment of the covenant.

The action was tried before Cozens-Hardy J. on November 13, 1899.

Astbury, Q.C., and *Edward Beaumont*, for the plaintiff. There are two objections to the "tie" attempted to be created by the provisions of the mortgage relating to the prohibition of the sale of malt liquors other than those purchased from the defendants.

In the first place, such a "tie" is inconsistent with the doctrines laid down in *Tulk* v. *Moxhay* (1); *Haywood* v. *Brunswick Permanent Benefit Building Society* (2); *London and South Western Ry. Co.* v. *Gomm.* (3) Secondly, the "tie" is an illegal clogging of the equity of redemption. On paying off all that the defendants have lent, with interest and costs, the plaintiff does not get his property back unfettered, but only

(1) (1848) 2 Ph. 774. (2) (1881) 8 Q. B. D. 403.
(3) (1882) 20 Ch. D. 562.

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obtains it subject to something which makes it of less value in his hands. It is still a tied house for the remainder of the leasehold term, and the plaintiff is unable to borrow money on it as easily as he could if no tie existed. The defendants will rely on *Santley* v. *Wilde* (1), but that case is distinguishable. There all that remained charged on the property after repayment of the loan, with interest, was a money payment representing a share of the profits of the theatre. Here the property is to remain clogged with a restriction against selling thereon any but the defendants' malt liquors. This case is also different from *Biggs* v. *Hoddinott* (2), for there the stipulation as to the sale of liquors was only in force during the existence of the mortgage to the brewers. It may be convenient for the defendant to argue that the doctrine about clogging the equity of redemption only now exists where there is fraud, oppression, or over-reaching on the part of the mortgagee. But such a contention is inconsistent with the decision of the House of Lords in *Salt* v. *Marquess of Northampton.* (3) There was a distinct bargain there with reference to the policy of assurance, which had never been the property of the mortgagor, and there was no fraud, oppression, or other unfair dealing, yet it was held that the policy belonged to the mortgagor on his paying off the sums secured. That case clearly recognises the doctrine as to clogging the equity of redemption, apart from any such equitable ground as fraud, pressure, or other unfair dealing. What the plaintiff would get back in this case on paying off the mortgage would not be the property—a free house—which he mortgaged, but a tied house.

[They also referred to *Willett* v. *Winnell.* (4)]

Eve, Q.C., and *Stanley Fisher*, for the defendant company. The property was bought by the plaintiff as a tied house. He knew of the "tie" then on it, and that the tie was to be reimposed. If there is a charge the case is like *Santley* v. *Wilde.* (1) It is sought to distinguish that case on the ground that only money was there charged, but in effect all that is charged in the present case is principal and interest plus the

(1) [1899] 2 Ch. 474.
(2) [1898] 2 Ch. 307.
(3) [1892] A. C. 1.
(4) (1687) 1 Vern. 488.

profits on the supply of malt liquors. The mortgage is the result of a deliberate bargain between the parties, and no fraud, oppression, or over-reaching is suggested. But it is clear from the judgment of Lindley M.R. in *Santley* v. *Wilde* (1) that the "obligation" can only be impeached on the ground of "fraud, oppression, or over-reaching." There is nothing in *Santley* v. *Wilde* (1) inconsistent with *Salt* v. *Marquess of Northampton.* (2) If the subject-matter were a patent, that could be mortgaged for the whole term of fourteen years on the terms of the mortgagee receiving a portion of the royalties.

[On the first point they referred to *King* v. *Dickeson.* (3)]

Astbury, Q.C., in reply. The redemption here is not to take place on payment of principal, interest, and profits as in *Santley* v. *Wilde.* (1) A charge still remains after payment of all the money secured by the mortgage.

Cur. adv. vult.

Nov. 16. COZENS-HARDY J. (after stating the facts). The question which I have to decide is whether the "tie" can be retained by the defendants. If this case had arisen for decision a few years ago, I think no judge of first instance would have hesitated to hold that the "tie" could not be enforced after the discharge of the security. It would have been regarded as a plain case of "clogging" the equity of redemption. But the supposed ancient doctrine of the courts has been so trenched upon in recent years that it is very difficult to say what part (if any) of it still remains.

It has been held that a mortgagor may be precluded from redeeming for a fixed period such as five or seven years: *Teevan* v. *Smith.* (4) It has been held that, during the full period in which a mortgagor is precluded from redeeming, he may be bound by covenant to buy his beer only from the mortgagee: *Biggs* v. *Hoddinott.* (5) In that case, the "tie" was objected to, not on the ground of its being a clog on the equity of redemption, but on the ground that it conferred on the

(1) [1899] 2 Ch. 474.
(2) [1892] A. C. 1.
(3) (1889) 40 Ch. D. 596.
(4) (1882) 20 Ch. D. 724, 729.
(5) [1898] 2 Ch. 307.

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mortgagee a collateral advantage which he was not entitled to retain. The objection, however, did not prevail. It has been held that a mortgagee of a leasehold theatre may, in consideration of a cash advance, take a covenant to repay the sum advanced with interest by quarterly instalments extending over five years, and to pay a share of the net profits of the theatre during the whole residue of the lease extending beyond the five years, and that a proviso for redemption on payment of all moneys covenanted to be paid, including the share of profits, is not invalid: *Santley* v. *Wilde*. (1) It will be observed that in that case the proviso for redemption was nugatory, because it only came into operation on the expiration of the lease, at which date, ex hypothesi, there would be nothing upon which the proviso could operate. If I rightly understand the judgment of the Court of Appeal, it established that a mortgage of leasehold property expressed to be a security for the due discharge of future recurring obligations cannot be redeemed before those obligations have matured, even though the period covered by the obligations may or must exceed the duration of the lease. I do not think any other or larger principle can be extracted from that case.

On the other hand, "once a mortgage, always a mortgage," is still a sound legal maxim. Anything which is comprised in a mortgage security must, when the debt is paid or the obligation is discharged, be returned to the mortgagor. It must be returned in its entirety. No part of it can be retained by the mortgagee. A remarkable instance of this doctrine is to be found in *Salt* v. *Marquess of Northampton*. (2) This doctrine is not questioned, and indeed is expressly admitted by the Court of Appeal in *Santley* v. *Wilde*. (1)

It remains to apply to the present case, as best I can, the principles to be gathered from the authorities both ancient and modern. In the first place, the mortgage is in terms a security only for the moneys covenanted to be paid—i.e., principal and interest, and the price of goods sold and delivered. All these moneys the plaintiff offers to pay. It does not profess to be a security for the performance of the negative covenant which

(1) [1899] 2 Ch. 474. (2) [1892] A. C. 1.

is commonly called a tie. In the second place, on payment of that which the plaintiff offers to pay, the event will happen upon which, by the terms of the deed, the defendants are bound to "surrender or reconvey the premises." In the third place, such a surrender or reconveyance is inconsistent with the retention of any charge on or interest in the premises. In the fourth place, the negative covenant or "tie" is expressed to be a "charge" on the premises. I doubt whether this phrase is strictly accurate. The precise operation of such a covenant has been described in different ways. Lord Cottenham in *Tulk* v. *Moxhay* (1) calls it an "equity attached to the property by the owner." Sir George Jessel in *London and South Western Ry. Co.* v. *Gomm* (2) calls it an "equitable burden." This much at least is clear—that, in the hands of the plaintiff and of any person taking with notice, this covenant imposes a fetter upon the enjoyment of the property and materially lessens its value. And in the present case no purchaser of the lease could escape being affected with notice.

Upon the whole, I think the "tie," though perfectly valid during the continuance of the security, cannot be maintained when all moneys due upon the security have been paid off. It seems to me to be involved in the very idea of a mortgage that a mortgagee, when paid off, shall have no estate or interest in the mortgaged premises, and no right to interfere with the mortgagor in his enjoyment or user of the premises. I must therefore declare that, on payment off of all moneys due, the plaintiff is entitled to have a reconveyance of the property, or at his option a transfer of the security, free in either case from the tie. The defendants must pay the costs of the action.

Solicitors for plaintiff: *Sandilands & Co.*
Solicitors for defendants: *Fishers.*

(1) 2 Ph. 774. (2) 20 Ch. D. 583.

F. E.

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Nov. 15, 16, 17.

In re LONDON AND NORTHERN BANK. *Ex parte* JONES.

Contract — Withdrawal of Offer before Acceptance — Acceptance by Post — Company — Shares — Companies Act, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 39, 62.

J. applied for shares in a company, but before the letter of allotment was posted—except by being delivered to a postman in a London street to be posted by him—a letter withdrawing his application was delivered at the company's registered office and opened by the secretary. By the rules of the Post Office town postmen are forbidden to take charge of letters for the post :—

Held, that the withdrawal was received by the company before the allotment letter was posted, and that there was no contract by J. to take the shares.

THE facts of this case, more fully set out in the judgment reported below, were, shortly stated, as follows :—

Dr. Jones, who lived in Sheffield, applied for shares in the London and Northern Bank, Limited. On October 26, 1898, he wrote from Sheffield a letter withdrawing his application, and this letter was received by the bank on October 27 at 8.30 A.M. On the afternoon of October 26 the directors of the bank resolved to allot the shares to Jones. The allotment notices to Jones and other applicants were prepared during the night of October 26—27, and about 7 A.M. on October 27 were taken to the outer precincts of the London General Post Office at St. Martin's-le-Grand. Here a postman came by and offered to take the letters. He was paid a small fee for his trouble, and according to the evidence on behalf of the bank he went into St. Martin's-le-Grand, came back, and said it was all right. The allotment letter to Jones was not delivered till 7.30 P.M. on October 27. From marks on the envelope it was indicated that the letter had not been posted at the General Post Office but at a district office, and there was evidence that, had it been posted at the General Post Office at 7.30 A.M., it would have gone to Sheffield by the 10 A.M. train ; whereas it in fact went by the 12 o'clock train. There was also evidence

that town postmen were not allowed to take charge of letters for the post, and that any postman disobeying this regulation would be reported to the proper authority.

Jones moved, under s. 35 of the Companies Act, 1862, for rectification of the register of members of the bank by removing his name therefrom in respect of the shares, and for a return of the application moneys paid by him in respect of them.

The motion was set down in the list of causes for trial with witnesses, and was heard by Cozens-Hardy J. on November 15 and 16, 1899.

Eve, Q.C., and *George Henderson*, for the applicant. The letter of withdrawal was delivered to the bank before the letter of allotment was posted; and there was, therefore, no acceptance of an existing offer, and the applicant is entitled to the relief he claims.

[They were stopped by the Court.]

Astbury, Q.C., and *Stewart-Smith*, for the bank. Before the bank received the letter of withdrawal the allotment letter, which was the acceptance of the applicant's offer to take the shares, was posted by being delivered to the servant and agent of the Post Office. That delivery was postage of the acceptance, and on the postage taking place the contract was complete: *Dunlop* v. *Higgins* (1); *Henthorn* v. *Fraser*. (2) After the letter of allotment had been carried into the Post Office the bank could not have got it back again.

The secretary could not accept the withdrawal letter; it did not reach the company when it was opened by the secretary. In *Truman's Case* (3) the question was whether a verbal withdrawal of an application for shares was sufficient, and it was held that it was; but the allotment in that case was made after the withdrawal.

Eve, Q.C., in reply. The postman was not the agent of the Post Office, for the *Postal Guide*, at p. 47, states that town postmen are not allowed to take charge of letters for the post. All communications may be addressed to a company's registered

(1) (1848) 1 H. L. C. 381. (2) [1892] 2 Ch. 27.
(3) [1894] 3 Ch. 272.

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office: Companies Act, 1862, s. 39; and any document may be served on the company by sending it to them by post: Ibid. s. 62.

Cur. adv. vult.

Nov. 17. COZENS-HARDY J. On October 15, 1898, Dr. Jones, who resides at Sheffield, applied for 1000 ordinary shares of 10*l.* each in the company, upon which he paid a deposit of 500*l.*, being 10*s.* per share. His letter of application, with cheque enclosed, was received in due course by the company. On October 26 Dr. Jones wrote from Sheffield a letter withdrawing his application and asking for a return of his 500*l.* This letter of withdrawal was sent as a registered letter. It was delivered at the office of the company at about 8.30 on the morning of October 27 before the arrival of the secretary. On the afternoon of October 26 a board meeting of the company was held, at which it was resolved to allot 1000 shares to Dr. Jones. An allotment letter addressed to Dr. Jones, dated October 26, was delivered in Sheffield at about 7.30 in the evening of October 27. Dr. Jones now applies to have his name removed from the register in respect of the 1000 shares, and for a return of his deposit, on the ground that his application was withdrawn before notice of acceptance.

The company alleges that, although the notice of allotment did not reach Dr. Jones until the evening of the 27th, it was posted at or about 7.30 on the morning of the 26th, and therefore before the letter of withdrawal arrived. It is settled law that an offer is to be deemed accepted when the letter of acceptance is posted, the reason being that the Post Office is considered the common agent of both parties: *Harris's Case.* (1) Hence, no delay on the part of the Post Office in delivering the letter will be material. The withdrawal, in order to be effectual, must be before the offer is clinched by the posting of the letter of acceptance. The question I have to decide is this—was the letter of allotment posted before the letter withdrawing the offer was received by the company? Now, the envelope containing the letter of allotment is produced. It bears a stamp

(1) (1872) L. R. 7 Ch. 587.

impressed with the words "11 A.M., 27 Oct., 98" with the figures "44" below. It has been proved that this stamp indicates that the letter was not posted at the General Post Office at all, but was deposited at one of the district post-offices in London, from which letters are collected and taken to the General Post Office. The letters thus collected are placed upon a separate bench or table, and this particular stamp is impressed on them. No work is done at this table until after 9.15. Letters posted at the General Post Office are dealt with at a different table and are impressed with a different stamp. If the letter had been posted at 7.30 at the General Post Office, it would have been forwarded by the 10 o'clock train to Sheffield and have been delivered before 7.30. It was in fact sent down in the ordinary course by a train at or about 12 o'clock, and was delivered in due course at 7.30.

This evidence raises a strong presumption in favour of the applicant. The company seeks to rebut this presumption, and the result of the evidence on its behalf is as follows: Mr. Claxton, who was employed by the promoters with a staff of about ten clerks, was engaged from shortly after the end of the board meeting on the afternoon of the 26th throughout the whole night in preparing from the allotment sheets the letters of allotment. Their task ended at about 7 in the morning, when Mr. Claxton and one of his clerks took the letters, which were fastened in bundles of fifty, in a cab to St. Martin's-le-Grand. They got out of the cab, and, seeing a porter in livery outside the building, had some conversation with him, in the course of which a postman came by and offered to take the letters. They gave him sixpence or a shilling for his trouble. He went into St. Martin's-le-Grand, came back, and said it was "all right." Mr. Claxton was not, in some respects, a satisfactory witness, but for the purposes of my judgment I assume that the letter of allotment to Dr. Jones was among those taken to St. Martin's-le-Grand and thus dealt with.

It was contended that this was a posting of the letter at St. Martin's-le-Grand. It seems to me, however, that the postman was not an agent of the Post Office to receive the letters. The *Postal Guide*, at p. 47 expressly states that town postmen

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are not allowed to take charge of letters for the post. Mr. Anderson, the witness from the Post Office, stated that any man would be reported if discovered to have done any such thing. I cannot, therefore, regard the postman as anything better than a boy messenger employed by Claxton to post the letters, and the mere fact of handing the letter to the postman outside St. Martin's-le-Grand was not a posting of the letter.

It is further urged that directly the postman entered St. Martin's-le-Grand the letter thereupon came into the lawful custody of the Post Office, and was posted, without reference to what the postman did with it. I am, however, unable to follow this view. It is not possible for me to ascertain precisely what was done with the letters by the unknown postman. He may have left them at a table or in a bag until some later hour. He may have taken them to a branch office. All I know is that it was not until a much later hour that they were found on the table appropriated to branch office letters. However that may be, I think that the company has failed to prove that the letter, which did not leave the Post Office until about 11 o'clock, was posted before 8.30, or before 9.30, at which hour the secretary arrived and opened the letter of withdrawal.

As to the point that the notice of withdrawal did not reach the company when it was opened by the secretary, I think there is no foundation for the suggestion. The secretary is the man whose duty it was to receive and open letters of that nature. The result is that I think the withdrawal was in time, and I must therefore make an order removing the name of Dr. Jones from the register in respect of the 1000 shares; and I must order the return of the deposit, with interest at 4 per cent. The company must pay the costs of the motion.

Solicitors for applicant: *Indermaur & Brown, for Webster & Styring, Sheffield.*

Solicitors for bank: *Walker & Rowe.*

F. E.

CAMPBELL *v.* GILLESPIE.

COZENS-HARDY J.

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Nov. 22, 23, 27, 29.

[1898 C. 3607.]

Administration Action—Trust Deed—Misconduct of Trustee—Common Accounts refused at the Trial—Discretion of Court—Rules of Supreme Court, 1883, *Order* LV., *r.* 10.

In 1887 A. conveyed his business and property to B. upon trusts for the benefit of his creditors with an ultimate trust for himself. Under the powers in the deed, B. carried on the business by means of an overdraft arranged with a bank. In 1893 A. assigned his interest under the deed to his wife, the plaintiff, for her separate use. In 1896 B. reconveyed the trust estate to the plaintiff, the reconveyance containing a recital that all A.'s debts had been paid. On this occasion some investigation of the trust account was made by the plaintiff, but a detailed account was not required. In July, 1898, B. destroyed all the books of account in the belief that they were no longer of use. In October, 1898, the plaintiff brought an action against B. charging him with fraud and misconduct, and claiming an account of all his transactions under the trust deed from 1887 to 1896 on the footing of wilful default. B. denied the charges, but admitted (1.) that he had improperly allowed the trust estate to be charged for a short period with interest at 5 per cent. on sums amounting to 10,000*l.*; (2.) that he had received the usual commissions, amounting to 31*l.* 10*s.* 8*d.*, on fire insurances of the trust estate; and (3.) that he had retained 52*l.* 17*s.* 6*d.* for debts of A. due in 1887, but never claimed. At the trial the charges of fraud and wilful default were not established, but the plaintiff claimed an order for a common account from 1887:—

Held, that, although B. had been guilty of some misconduct, it was not a case in which the Court, in the exercise of its discretion under Order LV., r. 10, would under the circumstances make an order for a common account; but there would be judgment for the plaintiff for the amounts admitted under the three items above mentioned.

By a creditors' deed dated January 22, 1887, and made between Thomas Campbell, an insolvent trader, of the first part, Messrs. Bass & Co., W. McEwan, and Robert Usher & Co., who were the three principal creditors of the debtor, of the second part, and the defendant Thomas Gillespie, a chartered accountant, of the third part, the debtor conveyed all his real and personal estate to the defendant upon trust for the benefit of his creditors. The deed contained various provisions enabling the trustee to carry on the debtor's business, which was that of a wine and spirit merchant. The trustee

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was authorized to buy liquors and goods from the three principal creditors and to borrow money from certain bankers, not exceeding an overdraft of 1300*l.*, which was guaranteed by the three principal creditors. The material trusts were: first, to pay costs, including remuneration to the trustee not exceeding 150*l.* a year; secondly, to pay a weekly allowance of 4*l.* to the debtor; thirdly, to pay the full amount due to the creditors other than the three parties to the deed; fourthly, to pay the money due to the bankers and the money due to the three creditors; and then to pay and transfer the surplus to the debtor. The defendant took upon himself the management of the business, substantially consisting of three public-houses, and little or nothing else, and this continued until the end of 1896. In August, 1893, the debtor for valuable consideration assigned all his interest under the deed to his wife, the plaintiff, for her separate use. On November 30, 1896, the defendant transferred to the plaintiff the three public-houses and a life policy, and all other the real and personal estate then vested in him upon the trusts of the deed of 1887. This deed did not contain any release by the plaintiff to the defendant, but it contained a recital that "all the debts and other moneys, the payment whereof was secured or provided for by the deed of 1887, had been paid and discharged"; and the defendant, in pursuance of a clause in the deed of 1887, certified that all the trusts and powers of that deed had been fully executed. On the occasion of this reconveyance some inquiry into the trust accounts was made by or on behalf of the plaintiff; but a detailed account was not required from the defendant. All the books and accounts of the trust, however, could have been inspected and investigated had she so desired.

In 1896 and 1897 the plaintiff had executed certain documents under which a Mr. Wilson became entitled to all her beneficial interest under the deed of 1887; but these documents were set aside by a judgment of Court in an action of *Campbell* v. *Wilson*. The defendant was a witness in this action, and had produced, under subpœna, the books of account of the trust. In July, 1898, the defendant sent all the books of account of the trust to a marine store dealer for destruction in

the honest belief that they were no longer of any use. In August, 1898, the plaintiff commenced the present action. By her statement of claim she charged the defendant with a series of fraudulent acts and misconduct, and claimed an account of all his dealings and transactions under the deed of 1887 on the footing of wilful default.

The defendant by his pleadings denied all the charges, but admitted: (1.) That for a short period he had advanced out of the trust account, which was overdrawn, sums (afterwards repaid) amounting altogether to 10,000*l.* to a theatre of which he was accountant, and that the trust estate had been charged with interest on the sums by the bank at the rate of 5 per cent. per annum. (2.) That as agent of an insurance office he had received the usual commission, amounting altogether to 31*l.* 10*s.* 8*d.*, on the fire insurance premiums of the trust estate. (3.) That when transferring the trust estate to the plaintiff in November, 1896, he had retained 52*l.* 17*s.* 6*d.* for debts of Thomas Campbell due in 1887, the payment of which, however, had never been demanded.

At the trial the charges of fraud were abandoned, and the plaintiff failed to prove wilful default; but the Court intimated that she had made out a primâ facie case for common accounts. The other material facts are sufficiently noticed in the judgment.

Eve, Q.C., *E. Ford*, and *Boxall*, for the plaintiff.

Warmington, Q.C., *Robson, Q.C.*, and *O. L. Clare*, for the defendant. On the evidence this is not a case for directing any accounts. Under Order LV., r. 10 (1), the Court has now a discretion and is not bound to order administration. When the trust property was conveyed to the plaintiff in 1896 no information was withheld from her, and the fullest investigation was open to her. By her conduct she led the defendant to believe that no further accounts would be required. The

(1) Order LV., r. 10, of the Rules of the Supreme Court, 1883, provides: "It shall not be obligatory on the Court or a judge to pronounce or make a judgment or order, whether on summons or otherwise, for the administration of any trust . . . . if the questions between the parties can be properly determined without such judgment or order."

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destruction of the books makes it impossible for him to render proper accounts, and will simply enable the plaintiff to blackmail him. Complete justice can be done by ordering payment of the amounts which the defendant has admitted.

Eve, Q.C., in reply.

Cur. adv. vult.

Nov. 29. COZENS-HARDY J., after stating the facts, continued:—On the plaintiff's opening I held that the facts alleged did not amount to wilful default, and I must therefore dismiss the action so far as it seeks to charge the defendant with wilful default. It remains, however, to consider to what relief, if any, the plaintiff is entitled. Under the old law I think it is plain that the defendant would have been entitled, as a matter of right, to a common account against the defendant. There has been no release; there has been no settled account; there has been nothing upon which the defendant could rely by way of defence. But happily, under Order LV., r. 10, I have now a discretion, and I am not bound to give the plaintiff a decree for a common account if the questions between the parties can be properly determined without such a decree. This discretion must be exercised upon due consideration of all the facts of the case. Now, it has been proved to my satisfaction that the defendant did keep proper books of account, in which were entered receipts and payments in the manner adopted by skilled accountants. These accounts were from time to time submitted to and approved by the agents of the three principal creditors, who have in the course of the trial been somewhat inaccurately called a committee of inspection. They were audited on the suggestion and at the cost of the defendant by a Mr. Forster, a competent accountant, in November or December, 1896. He certified to their correctness. Some, but not all, of those accounts thus audited and certified were handed to the plaintiff's solicitor. The plaintiff required information as to how much money the defendant claimed in order to close the trust and pay off all liabilities; and this information was given by the defendant. Among the liabilities mentioned was an item, "Private debts,

52*l.* 17*s.* 6*d.*," upon which I shall have to comment. The amount claimed was provided by the plaintiff, and the deed of 1896 was executed. The plaintiff and her solicitor, Mr. Ward, were apparently satisfied with the information and accounts thus furnished. I do not find that any application for more detailed accounts was ever made to the defendant by or on behalf of the plaintiff until shortly before the writ in this action was issued. The defendant in or about July, 1898, sent the account-books of this trust to a marine store dealer for destruction, together with other books which had been stowed away in an attic. This destruction was not effected with any idea of avoiding investigation by the plaintiff, though it was most unwise and, having regard to the item 52*l.* 17*s.* 6*d.*, which I must hereafter mention, improper. This destruction renders it almost impossible for the defendant to render full accounts under an ordinary decree. I have anxiously considered what, in my discretion, ought to be done under these circumstances, and I have come to the conclusion that it is not right that I should make a full administration decree, notwithstanding the fact that I am unable to acquit the defendant of some misconduct. I believe the trust accounts were honestly, properly, and accurately kept, and that Mr. Forster's certified accounts correctly represent what the books themselves would have shewn. I see no reason to doubt that the numerous cheques drawn in favour of the defendant or his firm represent cash properly expended for the purposes of the trust, the details of which expenditure were entered in the account-books and examined by Mr. Forster. To direct a common account from 1887 to 1896 would be to enable the plaintiff to blackmail the defendant. I think I can properly determine the questions between the parties without giving the plaintiff a full decree. Those questions seem to me to be three in number and no more. In the first place, the defendant in his answer to interrogatories admits that he drew upon this trust account cheques to the amount of upwards of 10,000*l.* for the purposes of a theatre, in no way connected with the trust, of which he was accountant, the amount of such cheques being repaid at short intervals by the managers of the

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theatre to the account. The particulars are given in the first schedule to the defendant's answer. As the trust account was always in debit, and the bankers were charging interest at 5 per cent., this saddled the trust estate with interest for a certain number of days which it otherwise would not have borne. Happily, the principal moneys have all been repaid and the amount of the interest is small. But I think it necessary to indicate my sense of the impropriety of the transaction by making a declaration that the defendant is liable to make good to the plaintiff the amount of interest thus by his acts improperly charged against the trust estate. The precise figures, as to which there is no dispute, can be inserted in the order. In the second place, the defendant in his answer to interrogatories admits that he has, without the plaintiff's knowledge, received in respect of commission on insurance premiums a sum of 31*l.* 10*s.* 8*d.*, which he is clearly not entitled to retain as against the plaintiff, and there must be a declaration to this effect. In the third place, there is the sum of 52*l.* 17*s.* 6*d.* which, in November, 1896, was retained by the defendant, as is alleged in respect of certain debts due at the date of the deed of 1887. It appears, however, that no claim was ever made in respect of these alleged debts, nor has any acknowledgment of them ever been given, nor has any inquiry of any sort ever been made by the defendant since November, 1896. The money thus retained is still in his hands. As I pointed out, the deed of November 30, 1896, contains a statement that all debts had been paid and discharged. I cannot help regretting that the defendant should have brought himself to believe that he was justified in keeping this money without either searching out the creditors (if any) or offering to hand it over to the plaintiff. I must therefore declare that the defendant is liable to pay this sum of 52*l.* 17*s.* 6*d.*, with 4 per cent. interest from November 30, 1896; but I shall require the plaintiff to give the undertaking, which her counsel offered, to abide by any order the Court may make hereafter as to refunding this sum. The result is that I dismiss the action with costs so far as it seeks to charge the defendant with wilful default. I give the plaintiff judgment for the three sums

which I have above indicated, and the defendant must pay the other costs of the action. There will be a set-off as to costs.

Solicitor for plaintiff: *E. Swain, for J. D. & D. M. Macdonald, Newcastle-on-Tyne.*

Solicitor for defendant: *C. Rogers, for Criddle & Criddle, Newcastle-on-Tyne.*

H. L. F.

BARSHT *v.* TAGG.

[1899 B. 827.]

Vendor and Purchaser—Conditions of Sale—"Outgoings"—Notice by Sanitary Authority to abate Nuisance.

Conditions of sale of leasehold houses provided that the purchase should be completed on August 11, 1898, and that "a purchaser paying his purchase-money is, as from that day, to be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings are (if necessary) to be apportioned, and such apportioned rent shall be paid on completion by each purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the before-mentioned day, the remainder of the purchase-money is to bear interest at the rate of 6*l.* per cent. per annum from that day to the day of actual payment thereof, or, at the option of the vendor, he may receive the rents and profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, and the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured, or deteriorated." Through default of the plaintiff, who had purchased one of the lots, his purchase was not completed on August 11, although the title had then been accepted, and the defendant, the vendor, remained in possession. In November, 1898, notices were served on the defendant as "owner" by the vestry under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), to abate nuisances on the property, and the cost of making the abatement, about 24*l.*, was paid by the defendant. In February, 1899, the plaintiff was ready to complete, and offered to pay interest at 6 per cent. on the balance of the purchase-money from August 11 on receiving the rents and profits from that date, and in that case to repay the 24*l.*, but he insisted that if the defendant retained the rents and profits he ought to bear the cost of the abatement:—

Held, that the 24*l.* being an outgoing (*Tubbs* v. *Wynne*, [1897] 1 Q. B. 74) which from the time when a good title was shewn must clearly be borne by the purchaser in the absence of express stipulation, the plaintiff would as from August 11 have been entitled to the rents and profits and

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liable to pay the 24*l.*, if the conditions had not given the vendor the option to keep the rents and profits in lieu of interest, but that there was nothing to relieve the plaintiff from the obligation to pay the outgoings, and that he could only obtain specific performance on paying the 24*l.* and the balance of his purchase-money.

AT a sale by auction at the Mart on July 7, 1898, certain leasehold dwelling-houses were offered for sale in lots subject to conditions of sale, Lot 5, consisting of three dwelling-houses, being Nos. 167, 168, and 169, Elwin Street, Hackney Road.

Clause 3 of the conditions of sale was as follows: "Each purchaser is, at the close of the sale to him, to pay down a deposit of 10*l.* per cent. on the amount of his purchase-money, and to sign an agreement in the form subjoined to these conditions for the completion of his purchase according to these conditions, and to pay the remainder of his purchase-money on the 11th day of August, 1898, at the office" of the vendor's solicitor, "at which time and place the purchases are to be completed, and a purchaser paying his purchase-money is as from that day to be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings are (if necessary) to be apportioned, and such apportioned rent shall be paid on completion by each purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the before-mentioned day, the remainder of the purchase-money is to bear interest at the rate of 6*l.* per cent. per annum from that day to the day of actual payment thereof, or, at the option of the vendor, he may receive the rents and profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, and the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured, or deteriorated."

Lot 5 was knocked down to the plaintiff, who signed the contract of sale and purchase annexed to and made subject to the conditions of sale, and duly paid his deposit.

A title was made out to his satisfaction and was accepted before August 11, but the plaintiff was not then in a position

to complete, and did not complete, and the defendant remained in possession of the property. On November 9, 1898, notices were served by the vestry of St. Matthew, Bethnal Green, under the Public Health (London) Act, 1891, upon the defendant, as "owner" of the three houses forming Lot 5, that nuisances existed on the property, the nature of the alleged nuisances being specified in the notices, which required the nuisances to be abated. The defendant, without waiting for any further proceedings to be taken by the public authority, caused the requisite work to be done to the houses and paid the cost of the work, amounting to 24*l.* 17*s.* 3*d.* The plaintiff in February, 1899, was ready to complete, and offered to pay interest at 6 per cent. on the balance of the purchase-money from August 11 on receiving the rents and profits from that date, and in that case to repay the 24*l.* 17*s.* 3*d.*, but he insisted that, if the defendant retained the rents and profits since August 11, the defendant ought himself to pay this sum.

The plaintiff brought an action against the vendor for specific performance of the contract to sell, and the action was tried on December 7 and 14, 1899.

Buckmaster, for the plaintiff. The 24*l.* 17*s.* 3*d.* paid by the vendor cannot be charged against the purchaser. The vendor cannot be allowed to retain the rents and profits under condition 3, and yet be relieved from the burdens attaching during the time in which he retained possession. Condition 3 is inconsistent with the vendor being trustee for the purchaser after the date fixed for completion, in respect of the rents and profits. The liability of the vendor to make the payment arose through his being the "owner," that is to say, "the person for the time being receiving the rack-rent of the premises": Public Health (London) Act, 1891, ss. 4, 11, 121, 141. The occupier would only be ultimately liable if he had expressly agreed to pay the amount: see s. 121. The amount is not charged upon the premises, but in the absence of express contract must be borne by the landlord, and by reason of the vendor's duty as landlord the work became necessary. If the obligation to pay had arisen before the title was accepted, the amount would

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have been payable by the vendor as an "outgoing": *Tubbs* v. *Wynne*. (1) Where completion is delayed through the purchaser's default, and the contract is silent as to who shall pay the rates and taxes, there is no authority on the point.

[*Eve, Q.C.*, referred to *Carrodus* v. *Sharp*. (2)]

That case only decides that in the absence of express agreement a purchaser when he goes into receipt of rents and profits must bear the burden of outgoings. The purchaser in this case would not, if the agreement had been silent, have had this burden cast upon him. Condition 3 was framed so as to prevent a purchaser delaying to complete from obtaining the benefit of the rents while the vendor only got interest on the balance of purchase-money, and its effect is only to give the vendor the benefits up to actual completion which he would have got up to the day fixed for completion.

Eve, Q.C., and *S. R. Earle*, for the defendant. The only question is what is the agreement between the plaintiff and the defendant. The latter was entitled to remain in possession or in receipt of the rents and profits, or, in the alternative, to be paid 6 per cent. on the balance of purchase-money, in either case until actual completion. Any excess in the amount of one over the other was to belong to the vendor. The contract does not relieve the plaintiff from his obligation to discharge outgoings payable after August 11, or charge the rents and profits in the defendant's hands, with payment of the outgoings.

[They referred to 1 Key and Elphinstone's Conveyancing Precedents, 5th ed. p. 234, note *c*.]

Cur. adv. vult.

Dec. 15. COZENS-HARDY J., after stating the facts, and that the 24*l*. 17*s*. 3*d*. was not a charge upon the rents, and would have been payable by the defendant even if all the houses had been empty, and also that the plaintiff would on completion get the houses improved by reason of the expenditure of this money, continued as follows:—

I think it is settled law that, in the absence of any stipulation on the subject, the vendor must bear all expenses and outgoings

(1) [1897] 1 Q. B. 74. (2) (1855) 20 Beav. 56.

of property sold down to the time when a good title was first shewn, so that the purchaser could prudently take possession, and also pay interest on his unpaid purchase-money from that time, and as from that time all such expenses and outgoings must be borne by the purchaser: see *Carrodus* v. *Sharp*. (1) The sum in question is an "outgoing" to which this principle would be applied: see *Tubbs* v. *Wynne*. (2) As the title was accepted on or before August 11, I think that, in the absence of any stipulation, the plaintiff would have been entitled, on the one hand, to the rents and profits as from that date, and, on the other hand, would have been bound to repay the sum which the defendant has paid in respect of these outgoings. The question which I have to decide is whether to any and, if so, what extent the position of the parties is altered by the express stipulation contained in condition 3. Now that condition distinctly provides that, if completion takes place on August 11, all rates, taxes, and outgoings are to be apportioned, and that the purchaser is to pay to the vendor an apportioned part of the current rents which have not yet been received but which in due course the purchaser will receive from the tenants. If, however, the purchaser is not ready to complete on that day, what is to happen? It is clear that the vendor must remain in possession until completion, and it seems to me that an option is given to the vendor. He may say, "You must pay me 6 per cent. interest, and I will account to you for the rents and profits since August 11"; or he may say, "I have in my pocket a certain sum which I have received from tenants since August 11. I will keep that sum and make no claim against you for interest." I do not think that, in that event, he can require the purchaser to make any payment in respect of the apportioned part of the current rents. He can only retain so much of the rents and profits as he has, in fact, received up to the actual completion. Is there anything in this condition to relieve the plaintiff from the obligation to discharge the outgoings? I think not. I cannot regard the second sentence of the condition as simply making the first sentence applicable to the actual date of completion whenever

(1) 20 Beav. 56. (2) [1897] 1 Q. B. 74.

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it may be. There are not in it any words about outgoings or apportionment, and I think it would be wrong to insert them by implication. I may observe that in 1 Key and Elphinstone's Precedents (see 5th ed. p. 234, note *c*), the words "less outgoings" are expressly added. The result is that I think the plaintiff is not entitled to specific performance except on the footing of paying to the defendant, in addition to the balance of the purchase-money, the sum of 24*l.* 17*s.* 3*d.* I presume the plaintiff elects to complete on that footing.

Solicitors for plaintiff: *Harris & Chetham.*
Solicitor for defendant: *E. Betteley.*

F. E.

In re STEAD. WITHAM *v.* ANDREW.

[1899 S. 298.]

Will—Absolute Gift—Secret Trust—Notice—Joint Tenants.

FARWELL

1899

Nov. 21, 22, 27.

Where a gift is made to A. and C. as joint tenants upon an alleged secret trust, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. that he will carry out the testator's wishes, and those cases in which the will is left unrevoked on the faith of a subsequent promise by A. In the former case the trust binds both A. and C.: *Russell* v. *Jackson*, (1852) 10 Hare, 204; *Jones* v. *Badley*, (1868) L. R. 3 Ch. 362. In the latter case A., and not C., is bound: *Burney* v. *Macdonald*, (1845) 15 Sim. 6; *Moss* v. *Cooper*, (1861) 1 J. & H. 352.

ACTION.

The principal question argued on the trial of this action, and the only one requiring a detailed report, was the effect of the communication of a secret trust to one only of two joint tenants.

The facts, so far as material, were as follows:—

Maria Stead, the testatrix, was a widow lady living at Harrogate. She had an annuity of 2000*l.* a year, but no other property except jewels, plate, pictures, and other personal chattels. Her nearest relative was her nephew, John William Collett. The plaintiff Mrs. Witham and the defendant, Mrs. Andrew, were very old friends.

The testatrix, by her will of April 29, 1897, appointed John Marsh, the plaintiff, and the defendant executors and trustees, and after making divers specific and pecuniary legacies—a great many being legacies to charities—devised and bequeathed all her real and personal estate and effects not thereby otherwise disposed of unto her said trustees upon trust for conversion, and after payment of her debts, funeral and testamentary expenses and legacies, directed them to stand possessed of her said residuary trust moneys upon trust for the plaintiff and the defendant Mrs. Andrew absolutely.

After the death of the testatrix in May, 1898, the plaintiff

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alleged that, prior to the execution of her will, the testatrix informed her that she proposed to leave the residue of her estate to the plaintiff and the defendant Mrs. Andrew, but subject to a trust, not declared on the face of the will, that 2000*l.* should be given out of the said residuary estate to John William Collett, and that any balance of the said residuary estate should be given to such of the charities mentioned in the said will as the plaintiff and the defendant Mrs. Andrew should think proper. The plaintiff further alleged that the testatrix executed her said will on the faith of a promise and consent by the plaintiff to accept and carry out the said trust, and in full confidence that the trust would also be performed by the defendant Mrs. Andrew. These allegations were subsequently held by the Court not to have been proved.

The defendant Mrs. Andrew alleged, and the Court held these allegations to have been proved, that no communication had ever been made to her in the lifetime of the testatrix as to the alleged wishes of the testatrix, or of any trust; and she now claimed to be entitled beneficially, and not as a trustee, to a moiety of the said residuary estate.

The plaintiff commenced the present action against Mrs. Andrew, John Marsh, and John William Collett, claiming a declaration as to the rights of all parties interested in the testatrix's residuary estate having regard to the alleged secret trust. The action was tried with witnesses, when the plaintiff, the solicitor who had prepared the will, and the defendant Mrs. Andrew were examined and cross-examined. Certain earlier wills, correspondence, and a memorandum book of the testatrix were also put in as evidence. The result of this evidence is stated in the judgment.

The residuary estate amounted to over 2000*l.*

Dibdin, for the plaintiff, opened the case to the Court.

Bramwell Davis, *Q.C.*, and *Errington*, for the defendant J. W. Collett. The communication of a secret trust to one of two joint tenants before the execution of the will is sufficient to bind both: *Russell* v. *Jackson* (1); *Jones* v. *Badley* (2);

(1) 10 Hare, 204. (2) L. R. 3 Ch. 362.

Springett v. *Jenings* (1); Jarman on Wills, 5th ed. pp. 194 and 195. A gift to two as tenants in common, with communication of the secret trust to only one, stands on a different footing: *Tee* v. *Ferris* (2); *Rowbotham* v. *Dunnett* (3); but when a secret trust has once been communicated to one of two joint tenants, or when it has been disclosed to and accepted by one, then the trust is fastened on the whole gift: *Freeman* v. *Laing* (4); Theobald on Wills, 4th ed. p. 66. This trust is therefore binding, and should be enforced in favour of this defendant.

E. P. Hewitt, for the defendant Mrs. Andrew. There is a distinction between those cases in which the will is made on the faith of an antecedent promise by the legatee and those in which the will is left unrevoked on the faith of a subsequent promise. In the latter case, only the one to whom the communication was made is bound: *Moss* v. *Cooper* (5); *Burney* v. *Macdonald*. (6) The evidence does not prove that the trust was communicated to the plaintiff before the execution of the will; on these authorities, therefore, the defendant Mrs. Andrew is not bound, and is entitled to her moiety beneficially.

P. B. Abraham, for the defendant Marsh, took no part in the argument.

Dibdin, in reply. Whether the trust was communicated to the plaintiff before or after the execution of the will is immaterial; it was admittedly communicated in the lifetime of the testatrix. The distinction between the case of a gift made in consequence of an antecedent promise, and a gift left unrevoked in consequence of a subsequent promise, is not sound. So long as the trust is communicated and accepted during the lifetime of the testator, the trust is good and binding on all the joint tenants.

Cur. adv. vult.

Nov. 27. FARWELL J. In this case the plaintiff asserts, and the defendant Mrs. Andrew denies, that there is a secret

(1) (1870) L. R. 10 Eq. 488.
(2) (1856) 2 K. & J. 357.
(3) (1878) 8 Ch. D. 430.
(4) [1899] 2 Ch. 355.
(5) 1 J. & H. 352.
(6) 15 Sim. 6.

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trust binding a gift of residue to them as joint tenants. The plaintiff is supported by the defendant J. W. Collett, the other defendant taking no part in the contest. [His Lordship having examined the evidence both documentary and oral, observing that no satisfactory reason had been suggested why the testatrix should not have given the residue direct to the defendant Collett had she been minded so to do, and that there was no evidence to fix the defendant Mrs. Andrew with notice before the date of the testatrix's death of any trust, continued:—]

I give the fullest credit to the plaintiff for desiring to speak the truth, and I do not forget that her evidence is entirely against her own pecuniary interest; but the defendant Mrs. Andrew is affected by no knowledge that would render it inequitable in her to adhere to the will, and the onus, therefore, is on the plaintiff to displace the clear words of gift in this will, and it is essential to her case, for the reasons I shall presently state, to prove that communication was made to the plaintiff by the testatrix with a view to creating a trust before the execution of the will. After considering the plaintiff's evidence carefully, I hold that she has not discharged the burden placed upon her. The plaintiff is, of course, bound by her own admissions, but I am not quite satisfied that the testatrix ever intended to create a secret trust at all. But, assuming that the trust was communicated to the plaintiff after the execution of the will, the facts stand thus: A gift by will to the plaintiff and the defendant Mrs. Andrew in joint tenancy; a trust affecting that gift communicated by the testatrix to and accepted by the plaintiff alone after the execution of the will; entire ignorance of this trust by the defendant Mrs. Andrew until after the testatrix's death. The authorities establish the following propositions: If A. induces B. either to make or to abstain from revoking a will leaving him property, by expressly promising or tacitly consenting to carry out B.'s wishes concerning it, the Court will hold this to be a trust, and will compel A. to execute it: see *McCormick* v. *Grogan* (1), where Lord Hatherley says: "But this doctrine evidently

(1) (1869) L. R. 4 H. L. 82, 89.

requires to be carefully restricted within proper limits. It is in itself a doctrine which involves a wide departure from the policy which induced the Legislature to pass the Statute of Frauds, and it is only in clear cases of fraud that this doctrine has been applied—cases in which the Court has been persuaded that there has been a fraudulent inducement held out on the part of the apparent beneficiary in order to lead the testator to confide to him the duty which he so undertook to perform." If A. induces B. either to make, or to leave unrevoked, a will leaving property to A. and C. as tenants in common, by expressly promising, or tacitly consenting, that he and C. will carry out the testator's wishes, and C. knows nothing of the matter until after A.'s death, A. is bound, but C. is not bound: *Tee* v. *Ferris* (1); the reason stated (2) being, that to hold otherwise would enable one beneficiary to deprive the rest of their benefits by setting up a secret trust. If, however, the gift were to A. and C. as joint tenants, the authorities have established a distinction between those cases in which the will is made on the faith of an antecedent promise by A. and those in which the will is left unrevoked on the faith of a subsequent promise. In the former case, the trust binds both A. and C.: *Russell* v. *Jackson* (3); *Jones* v. *Badley* (4), the reason stated being that no person can claim an interest under a fraud committed by another; in the latter case A. and not C. is bound: *Burney* v. *Macdonald* (5) and *Moss* v. *Cooper* (6), the reason stated (7) being that the gift is not tainted with any fraud in procuring the execution of the will. Personally I am unable to see any difference between a gift made on the faith of an antecedent promise and a gift left unrevoked on the faith of a subsequent promise to carry out the testator's wishes; but apparently a distinction has been made by the various judges who have had to consider the question. I am bound, therefore, to decide in accordance with these authorities, and accordingly

(1) 2 K. & J. 357.
(2) Ibid. 368.
(3) 10 Hare, 204.
(4) L. R. 3 Ch. 362.
(5) 15 Sim. 6.
(6) 1 J. & H. 352.
(7) 1 J. & H. 367.

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I hold that the defendant Mrs. Andrew is not bound by any trust.

With regard to the costs of the action, the plaintiff has done her duty, and must have her costs as between party and party out of the moiety of the residue, which she admits that she holds for the defendant Collett. The defendant Mrs. Andrew has successfully resisted the claim against her—a claim which has been actively supported by the defendant Collett—and her costs must be taxed as between party and party and must also be paid out of the defendant Collett's moiety. These two ladies are trustees and executors, and their costs and those of the defendant Marsh (including costs, charges, and expenses properly incurred) will be taxed as between solicitor and client; the whole of Mr. Marsh's costs, and the difference between the party and party and solicitor and client costs of the two ladies will be paid out of the whole residue. I make no order as to the defendant Collett's costs.

Solicitors: *Vincent & Vincent, for North & Sons, Leeds; Iliffe, Henley & Sweet, for Russell & Mackay, York; Torr, Gribble, Oddie & Sinclair, for Nelson, Barr & Nelson, Leeds.*

W. C. D.

POWELL *v.* POWELL.

FARWELL J.

1899

Nov. 24, 27, 29, 30; *Dec.* 1, 2.

[1898 P. 2817.]

Voluntary Settlement by Young Lady only just of Age—Rescission—Undue Influence — Fiduciary Relationship — Independent Advice — Power of Revocation—Duty of Solicitor—Costs.

Where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice unless he acts on that advice: it is the duty of a solicitor independently advising an intending settlor to protect him against himself, and not merely against the personal influence of the donee in the particular transaction; and if his advice is not accepted he should decline to act further for the intending settlor.

In every voluntary settlement of this kind a power of revocation should be inserted.

Voluntary settlement by a young lady just of age set aside with costs against the relation in whose favour it was made and by whose undue influence it had been executed: trustee, being the solicitor who had drawn the settlement, disallowed his costs of the action in which the settlement was set aside.

ACTION.

The object of this action was to set aside a voluntary settlement of March 14, 1898, made by the plaintiff, Ellen Jeanie Burleigh Powell, shortly after she attained the age of twenty-one years, on the ground that her execution of it had been improperly procured by the undue influence of her step-mother, the defendant Alice Mary Powell, and her solicitor, who was one of the trustees of the settlement. The action was tried with witnesses, and, after the examination of the plaintiff and the cross-examination of the step-mother and the solicitor who had prepared the settlement, and was also alleged to have given independent advice to the plaintiff, it was evident that there was no defence to the action, and the case is only reported for the sake of the general observations made by his Lordship at the end of his judgment, as to the position of persons accepting the benefit of a voluntary settlement, the amount and nature of the independent advice necessary in cases of this kind, and the duty of a solicitor when advising

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or acting for a young person who is determined to make a voluntary settlement or gift.

The following outline of the plaintiff's case will be sufficient to make the judgment intelligible:—

The plaintiff, as the only child of the late Walter Burleigh Powell by his first wife, became entitled under the settlement made on that marriage, subject to her father's life interest therein, to a sum of about 6000*l.* on attaining twenty-one.

In June, 1878, W. B. Powell married a second time, and there was issue of this marriage a son and a daughter. W. B. Powell died in 1896, having appointed the defendant, Alice Mary Powell, guardian of the plaintiff.

In October, 1894, the plaintiff was sent to a convent in Belgium to be educated, and she remained in that institution without returning home until December, 1897, when she returned to England to live with the defendant, Alice Mary Powell.

In January, 1898, on the plaintiff's twenty-first birthday, the defendant handed her a document signed by her late father and dated June, 1890, in which he expressed an earnest wish that the personal property that accrued to her should be divided with the other two children. The plaintiff, in order to give effect to her late father's wishes, was persuaded to execute the settlement of March, 1898, under which she took one-third only of the income during the joint lives of herself and the defendant, the defendant taking the remaining two-thirds, with ultimate limitations of the capital on the death of the defendant amongst the plaintiff and her half brother and sister. This settlement contained no power of revocation.

The same solicitor acted for the plaintiff and her step-mother; the settlement and the effect of it was said to have been fully explained to the plaintiff by this solicitor, who alleged in his statement of defence that nothing he could advise would make the plaintiff change her mind. In December, 1898, the plaintiff commenced the present action against her step-mother, the solicitor who had prepared the settlement and who was also one of the trustees, the other trustee of the settlement, and her half brother and sister, who were infants, claiming to have the

settlement set aside and delivered up to be cancelled. Costs were also claimed against the defendant, Alice Mary Powell, and the solicitor.

Warmington, Q.C., Badcock, Q.C., and *S. Dickinson*, for the plaintiff.

Bramwell Davis, Q.C., and *St. John Clerke*, for the defendant Alice Mary Powell.

Hughes, Q.C., and *R. F. Norton*, for the solicitor.

Johnston Edwards, for the other trustee.

[The following cases were cited or referred to: *Archer* v. *Hudson* (1); *Hoghton* v. *Hoghton* (2); *Wright* v. *Vanderplank* (3); *Everitt* v. *Everitt* (4); *Marsh* v. *Joseph* (5); *Burstall* v. *Beyfus* (6); *Hoblyn* v. *Hoblyn*. (7)]

FARWELL J., after reviewing the evidence, held that the plaintiff was induced by strong moral pressure to execute this settlement, that she did not have the benefit of the advice of an independent solicitor, that the defendant solicitor who purported to act for her had in fact acted throughout the business for the step-mother as well, that he had never examined the plaintiff separately to ascertain whether she was acting independently, and had not advised her as to the proper course to adopt, or recommended the insertion in the settlement of a power of revocation. His Lordship then continued:—

I propose to state my view of the law in respect to matters of this nature.

It has been for many years well settled that no one standing in a fiduciary relation to another can retain a gift made to him by that other, if the latter impeaches the gift within a reasonable time, unless the donee can prove that the donor had independent advice, or that the fiduciary relation had ceased for so long that the donor was under no control or influence whatever. The donee must shew (and the onus is on him)

(1) (1844) 7 Beav. 551.
(2) (1852) 15 Beav. 278.
(3) (1856) 8 D. M. & G. 133.
(4) (1870) L. R. 10 Eq. 405.
(5) [1897] 1 Ch. 213.
(6) (1884) 26 Ch. D. 35.
(7) (1889) 41 Ch. D. 200.

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that the donor either was emancipated, or was placed, by the possession of independent advice, in a position equivalent to emancipation.

A man of mature age and experience can make a gift to his father or mother because he stands free of all overriding influence except such as may spring from what I may call filial piety; but a young person (male or female) just of age requires the intervention of an independent mind and will, acting on his or her behalf and interest solely, in order to put him or her on an equality with the maturer donor who is capable of taking care of himself. It is sufficient to refer to *Archer* v. *Hudson* (1), *Wright* v. *Vanderplank* (2), and the cases collected in the notes to *Huguenin* v. *Baseley*. (3) On the authorities it appears to me not to be a question of actual pressure, or deception, or undue advantage, or want of knowledge of the effect of the deed. The mere existence of the fiduciary relation raises the presumption, and must be rebutted by the donee in the way that I have just stated. Further, it is not sufficient that the donor should have an independent adviser unless he acts on his advice. If this were not so, the same influence that produced the desire to make the settlement would produce disregard of the advice to refrain from executing it, and so defeat the rule; but the stronger the influence the greater the need of protection. The real meaning of the rule is that the youth, being in the eye of the Court unfit to deal irrevocably with his parent or guardian in the matter of a gift of this kind, must appoint some independent adviser to act for him. It is the action resulting from the advice, not action against the advice, that binds the donor.

Further, in my judgment, the donee does not discharge this burden by shewing that his own solicitor acted for both parties. A solicitor who accepts such a post puts himself in a false position; if he acts for both, he owes a duty to both, to do the best that he can for both. But the Court requires that the donor should be placed in as good a position as if he were in fact emancipated. The solicitor, therefore, must be indepen-

(1) 7 Beav. 551. (2) 8 D. M. & G. 133.
(3) (1807) 1 W. & T. 7th ed. 247.

dent of the donee in fact, and not merely in name, and this he cannot be if he is solicitor for both. Again, his duty is to protect the donor against himself, and not merely against the personal influence of the donee, in the particular transaction. The necessity for the protection arises in great measure from the natural bent of mind and will resulting from the relation (e.g.) of parent and child during the impressionable period of youth, and the solicitor does not discharge his duty by satisfying himself simply that the donor understands and wishes to carry out the particular transaction. He must also satisfy himself that the gift is one that it is right and proper for the donor to make under all the circumstances; and if he is not so satisfied, his duty is to advise his client not to go on with the transaction, and to refuse to act further for him if he persists. He certainly ought not to go on if he disapproves, simply because, as was suggested in this case, he thinks that some one else will do the work if he does not. The plea that offences must needs come does not exonerate the man by whom the offence cometh. The more foolish and wilful the conduct of the youthful donor appears to the solicitor, the less should he lend the sanction of his countenance to the gift. If it is said that this would prevent some persons who are of age from doing what they choose with their own property, the answer is that they can deal with it, but not irrevocably. It is not the policy of the law to allow the parent to take advantage of his position without giving the child an opportunity of changing his mind within a reasonable time when he has acquired experience and wisdom. The donor is benefited, not injured by this; and the donee cannot be heard to say that it is an unjust rule, because, ex hypothesi, he does not come into court with clean hands, and has no equity. I adopt Bowen L.J.'s words in *Allcard* v. *Skinner* (1), which express better than I can the views I wish to adopt: "This is not a limitation placed on the action of the donor; it is a fetter placed upon the conscience of the recipient of the gift, and one which arises out of public policy and fair play." Further, the revelation to the child of the memorandum by her dead father was in itself an

(1) (1887) 36 Ch. D. 145, 190.

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exercise of moral pressure of the strongest kind. The father signed the document six years before his death, when he was apparently annoyed with his daughter, and it may not have represented his last wishes. But I feel bound to say that in my judgment such a memorandum is an improper attempt to exercise posthumous pressure, and is most obnoxious to the rule of the Court. It is an appeal of a nature most difficult for a young person just twenty-one to resist, especially if the child is told at the same time (as in the present case) that she is bound in honour to obey, and will be regarded as a social pariah if she does not. The result, therefore, is that I must set aside the whole of this settlement, and order it to be delivered up to be cancelled, and I order the defendant Alice Mary Powell to pay the costs of the action. The solicitor defendant does not ask for costs—I could not give them to him if he did; I will not make him pay them, as that would be tantamount to branding him with misconduct; but, in my opinion, he has failed to discharge his duty, and I can give him no costs.

Solicitors: *W. & W. Stocken; C. R. Berkeley, Son & Haines; Horwood & Crossley.*

W. C. D.

In re JOSEPH TYE (A PERSON OF UNSOUND MIND NOT SO FOUND).

C. A. 1900 Jan. 15.

Lunacy—Person of Unsound Mind not so Found—Pauper Lunatic—Application of Property—Jurisdiction—Discretion—Lunacy Act, 1890 (53 & 54 *Vict.* c. 5), *s.* 299.

Sect. 299 of the Lunacy Act, 1890—which enables a justice to order the application to the expenses of maintenance of a lunatic chargeable to any union or local authority of any property of the lunatic more than sufficient to maintain his family, if any—does not affect the jurisdiction of the Court in Lunacy as to the application of the lunatic's property.

A man who was taken in charge as a wandering lunatic, and placed in a pauper lunatic asylum, had in his possession a sum of about 337*l.* His only other property was a 10*l.* share in a co-operative society and some furniture of small value. He had carried on business as a market gardener. He had not been found lunatic by inquisition. He was sixty-four years of age and his wife was sixty. He had a daughter aged twenty, who lived with her mother, and seven grown-up sons, who did not contribute to their mother's support:—

Held, that the discretion of the Court as to the application of the lunatic's property would be properly exercised by allowing out of the fund (the capital being used for the purpose) the sum of 26*l.* a year to the guardians as the cost of his maintenance in the asylum, and the sum of 25*l.* a year to the wife, and an order was made accordingly.

Per Vaughan Williams L.J.: *Semble*, that after the making of the order the lunatic would no longer be in the position of a pauper lunatic.

ON May 8, 1899, Joseph Tye was taken in charge as a wandering lunatic and was placed in the Holbeach Workhouse. He was afterwards transferred to the Bracebridge Asylum, near Lincoln, where he was maintained as a pauper lunatic. At the time when he was placed in the workhouse he had in his pocket a sum of 336*l.* 19*s.*, of which the guardians took possession. He was also entitled to a 10*l.* share in the Halifax Co-operative Society, and to some furniture of small value. He had formerly lived at Elland, in Yorkshire, where he had carried on the business of a market gardener. In February, 1897, he sold the business. In January, 1899, he went to America, leaving his wife destitute, and in March, 1899, she had to go into the Halifax Workhouse. Towards the end of

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January Tye returned to England, and on March 21 he returned to his home and took his wife out of the workhouse. Towards the end of April he went away again, and his wife knew nothing about him until the middle of May, when she discovered that he was in the Holbeach Workhouse. On July 11, 1899, the lunatic was removed to the Wakefield Asylum, where he was maintained as a pauper lunatic at the expense of the Halifax Union.

The lunatic had one daughter, aged twenty, who lived with her mother. He had also seven grown-up sons, who did not contribute to their mother's support. The lunatic was sixty-four years of age and his wife was sixty.

On August 9, 1899, an order was, on the application of the wife, made by the Master in Lunacy, upon the wife's undertaking (inter alia) to apply all such moneys as she might receive belonging to the lunatic or his estate and all moneys which she might receive on his account, in such manner as the Masters in Lunacy should direct, and to account for such moneys when required, and, further, to give such security for the due application of and accounting for such moneys as might be required by any order of the masters. The order contained a recital that it had been established to the satisfaction of the master that Joseph Tye was of unsound mind, and incapable of managing his affairs, and that his property did not exceed 2000*l.* in value, or that the income thereof did not exceed 100*l.* per annum; and it was ordered: (1.) That the wife should be at liberty to retain for her own use the furniture and household effects belonging to the lunatic, and that the sum of 35*l.* a year should be allowed for or towards her maintenance from May 8, 1899, or until further order. (2.) That the wife should be authorized in the name and on behalf of the lunatic to realize or sell the share of 10*l.* in the Halifax Co-operative Society belonging to him, and to receive and give a discharge for the amount thereof or the proceeds of such sale, and to execute such transfer to the purchaser of the share as might be necessary to complete the sale thereof.

The schedule to the order directed the treasurer of the Holbeach Union to lodge the 336*l.* 19*s.* in court, and that out

of this sum when lodged 17*l.* 10*s.* should be paid to the wife. The balance was to be invested in India stock, of which a sufficient sum was to be sold to raise the amount of the taxed costs. Out of the dividends of the India stock and a sale from time to time of a sufficient part of the stock 17*l.* 10*s.* was to be paid to the wife half-yearly.

On August 12, 1899, the guardians of the Halifax Union issued a summons by which they asked that out of the 336*l.* 19*s.* the sum of 6*l.* 10*s.* might be paid to them for the past maintenance of the lunatic from July 11, 1899, and that the sum of 26*l.* per annum might be allowed to the applicants out of the residue of the 336*l.* 19*s.* for the future maintenance of the lunatic, and that a sum not exceeding 25*l.* per annum might be allowed for the future maintenance of the wife and family of the lunatic as from July 11, 1899. The master refused this application. He was of opinion that neither s. 116 nor s. 117 of the Lunacy Act, 1890, empowered him to grant the application. And, as to s. 299, the master said: "The result of that section is to give to the guardians a statutory claim for repayment of the expenses they may incur out of any property of the lunatic, but subject to a distinct restriction, viz., that sufficient must be left to maintain the lunatic's family. The guardians are therefore creditors, but creditors subject to a particular restriction, and as, in my opinion, the present fund in court is not more than sufficient to maintain the lunatic's family it seems to me that the claim of the guardians must fail."

The guardians appealed to the Court.

Younger, Q.C., for the wife, stated the facts.

[He was stopped by the Court.

LINDLEY M.R. Can it be right that no provision should be made for the maintenance of the lunatic out of his own money?]

Method, for the guardians. According to s. 299 (1) of the

(1) By s. 116, "(1.) The powers and provisions of this part of this Act relating to management and administration apply (inter alia)

"(*c*) To every person lawfully detained as a lunatic though not so found by inquisition."

"(*e*) To every person with regard to whom it is proved to the satisfaction of the judge in Lunacy by the

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Lunacy Act, 1890, the guardians cannot recover anything out of the lunatic's property when it is only sufficient for the support of his wife and family.

[LINDLEY M.R. Is it not the first duty of the Court to maintain the lunatic out of his own property?]

The guardians do not propose to spend more than 10*s.* a week upon him. They are only seeking to recover out of his property what they have spent and are spending. In *Winkle* v. *Bailey* (1) the lunatic had no family. Under s. 24, sub-s. 2(*f*), of the Local Government Act, 1888, the guardians are entitled to receive 4*s.* a week from the county council towards the maintenance of a pauper lunatic.

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certificate of a master, or by the report of the commissioners, or by affidavit or otherwise, that such person is of unsound mind and incapable of managing his affairs, and that his property does not exceed 2000*l.* in value, or that the income thereof does not exceed 100*l.* per annum."

"(4.) The powers of this Act relating to management and administration shall be exercisable in the discretion of the judge for the maintenance or benefit of the lunatic or of him and his family, or where it appears to be expedient in the due course of management of the property of the lunatic."

By s. 117, "(1.) The judge may order that any property of the lunatic, whether present or future, be sold, charged, mortgaged, dealt with, or disposed of as the judge thinks most expedient for the purpose of raising or securing, or repaying with or without interest, money which is to be or which has been applied to all or any of the purposes following: (inter alia)

"(*c*) Payment of any debt or expenditure incurred for the lunatic's maintenance or otherwise for his benefit;

"(*d*) Payment of or provision for the expenses of his future maintenance."

These two sections are comprised in Part IV. of the Act, which is headed "Judicial powers over person and estate of Lunatics," ss. 116–130 forming a sub-division of that part headed "Management and Administration."

By s. 299, "(1.) If it appears to any justice that a lunatic, chargeable to any union, or local authority, has any real or personal property more than sufficient to maintain his family, if any, such justice may by order direct a relieving officer of the union, or the treasurer or some other officer of the local authority, to seize so much of any money, and to seize and sell so much of any other personal property of the lunatic, and to receive so much of the rents of any land of the lunatic as the justice may think sufficient to pay the expenses of maintenance and incidental expenses respectively incurred or to be incurred in relation to the lunatic."

Sects. 299 and 300 are comprised in Part X. of the Act, which is headed "Expenses of Pauper Lunatics," those two sections forming a sub-division which is headed "Application of Lunatic's Property."

(1) [1897] 1 Ch. 123.

[LINDLEY M.R. Strictly speaking, s. 299 does not apply here. I think it does no more than what it says—give a summary jurisdiction to a justice. A justice may not be able to exercise that jurisdiction unless the lunatic's property is more than sufficient to maintain his family; but this does not affect the jurisdiction of the Court of Lunacy. Has such an order as this ever been made in Lunacy?]

It does not appear that such an order has been made before this order. But it would not be for the benefit of the lunatic that his property should be applied in aid of the rates.

LINDLEY M.R. I do not think it is necessary to go through the Act or to consider the authorities more closely than we have already done. We have had the opportunity of considering the master's judgment and of looking into the Act. The case is a peculiar one, and I doubt whether it is likely to be of any value as a precedent. We are asked to say that a lunatic who has property ought not to contribute out of it to his own support. I am not prepared to go that length. It is obvious that there is nothing in the Lunacy Acts which directs us to do so, and it is a startling proposition that a man who has the misfortune to be a lunatic and has money should be supported by the rates. There is a fund of between 300*l.* and 400*l.* belonging to this lunatic, and the master has in effect ordered that he shall be supported by the guardians, and that his wife and family shall have 35*l.* a year, mainly out of the capital, for so long as it lasts. That leaves the lunatic on the rates, although he has money enough to keep him off. That is not in accordance with the manner in which the discretion of the Court has been hitherto exercised in dealing with the property of lunatics. It is quite new to me that the Court should allow a lunatic who has property to be maintained out of the rates. The Court has been in the habit of applying the property of a lunatic first in supporting him. I do not say that this is for the benefit of the lunatic; I am not sure that it is. It may be that the guardians must support him if the Court does not. But the Court ought to support him if it can. Having regard to the small amount of the fund here, the question is what is

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the best thing to be done with it so far as it goes. One mode of dealing with it, and we certainly have authority to do so, would be to leave the lunatic in this asylum—the best place for him probably—and to grant him such an allowance out of the capital of the fund as would assure him greater comfort than the 10*s.* a week expended by the guardians would provide for him: we have ample power to do that. This would leave the lunatic's wife on the rates, as very likely she would not be able to support herself. That would be one way of regarding the matter for the lunatic's benefit, and not for the benefit of his family. But I think we ought to have some regard to the future; and considering the ages of the parties, the kind of life to which they have been accustomed, and the small amount of the fund, the proposal made by the guardians is in my opinion on the whole the best, that is, not to allow the lunatic to be supported by the rates, but to apply his property, so long as it lasts, to the extent of 10*s.* a week, to his maintenance in the asylum (there is no better place for him), and then to allow the wife 25*l.* a year so long as the money lasts. When the fund is exhausted they both, husband and wife, will come upon the rates. There is no help for it. As regards the costs, I do not look upon this as a question of legal rights. I think the guardians ought not to have any costs, but I do not think they ought to pay any. The wife as receiver will have her costs out of the fund. If we gave all the costs out of the fund, there would be very little of it left. The master's order will be varied by directing 26*l.* a year to be paid to the guardians, and 25*l.* a year to the wife.

VAUGHAN WILLIAMS L.J. I agree, but I think there is considerable difficulty in the case. This man is in an asylum as a pauper lunatic. We have power to make such an order as in our discretion we may think right for the maintenance or benefit of the lunatic, or of him and his family. So long as he continues to be maintained as a pauper lunatic I feel some difficulty in saying that we should be justified in ordering the appropriation of this money for his maintenance. For aught I know, if we did so, there might be great difficulty when the

accounts of the asylum come to be audited. But I do not understand that we are making the order upon the basis that the lunatic is in form to continue a pauper lunatic. The guardians have made a very reasonable and sensible suggestion, and they have told us what they intend to do about him. Probably there will be no difficulty in carrying out their proposal, but I very much doubt whether this man will continue to be a pauper lunatic when our order has been made. And, speaking for myself, I should feel considerable hesitation in making the order if I thought that, after we had made it, this man would continue to be a pauper lunatic, because I do not think that in any proper sense of the word the order would then be made for his maintenance. The order would really be to recoup to the guardians the expense incurred by them in the maintenance of the pauper lunatic, and not an order for his maintenance. Of course we have a discretion, if we think it right, to order a sum to be appropriated to his maintenance in the asylum as a lunatic whose maintenance is paid for, and the guardians, as I understand it, are willing to treat him in that way. Under these circumstances I think we have power to make the order.

ROMER L.J. I agree with the judgment of the Master of the Rolls. Suppose that this lunatic had not been placed in the union lunatic asylum, and we had to consider what should be done with regard to his maintenance, ought we then, seeing that he has a few hundred pounds of his own, to say we will not apply any portion of that sum in maintaining him, but will apply it all for the benefit of his wife and family, so as to drive him into the union lunatic asylum? I think not. I do not think it would be right in that case in the exercise of our discretion to say that it would be for his benefit that he should be made a pauper lunatic as the result of applying the whole of his property for the benefit of his wife and family. It makes no difference, as it seems to me, that in fact he has been already dealt with as a pauper lunatic. What ought we to do in that state of things? We might, I think, adopt one of two courses. One course would be to take him out of the union

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asylum and maintain him in some private asylum. That would be a very expensive course. Another course would be to apply a part of his money in maintaining him as a private patient in the union asylum, and that would be perhaps the strictly appropriate course. But we have a discretion in the administration of this small fund, and we must bear in mind the interest of the lunatic in respect of his wife and family, and the question is, is it more for his benefit that he should cease to be in any point of view a pauper lunatic, and his wife and family (practically it is the wife) be left wholly unsupported, or is it better to allow him to a certain extent to be called or dealt with as a pauper lunatic, and to apply a portion of the fund towards his maintenance, and a portion of it to the maintenance of his wife and children? Having regard to the peculiar circumstances of this case and the small amount of the fund, it appears to me on the whole that, in exercising the discretion which we undoubtedly possess, the best thing to do with this small fund will be that which has been proposed by the Master of the Rolls.

LINDLEY M.R. The guardians will be allowed out of the fund the 6*l.* 10*s.* which they have expended for the past maintenance of the lunatic.

Solicitors: *Bower, Cotton & Bower, for Longbotham & Sons, Halifax; Rowcliffes, Rawle & Co., for Ramsden, Sykes & Ramsden, Huddersfield.*

W. L. C.

C. A.
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HOPE *v.* WALTER.

[1898 H. 634.]

Vendor and Purchaser—Specific Performance—Property used as a Disorderly House.

Property sold by auction under the description of an eligible freehold property for investment, comprising a house and shop let on a quarterly tenancy, was discovered before completion to be used by the tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, and a proviso for re-entry in case of breach of covenant:—

Held, (1.) (reversing Cozens-Hardy J.) that specific performance ought not to be granted, inasmuch as the purchaser, unless he took steps to prevent the improper use of the property by the tenant, would become liable as lessor to criminal proceedings under the Criminal Law Amendment Act, 1885, by reason of the state of the property at the time of the sale; (2.) (affirming Cozens-Hardy J.) that this was not a ground for rescission of the contract.

Lucas v. *James*, (1849) 7 Hare, 410, distinguished.

APPEAL by the defendant from a decision of Cozens-Hardy J. (1)

Eve, Q.C., and *Tomlin*, for the defendant, repeated the arguments urged in the Court below. In addition to the cases there cited, upon the point of mutual mistake as to the subject-matter, they cited *Emmerson's Case* (2); and upon the point that the purchaser would be exposed to criminal proceedings by reason of the state of the property, *Rex* v. *Pedly*. (3)

[VAUGHAN WILLIAMS L.J. upon the latter point referred to *Rich* v. *Basterfield* (4) and *Gebhardt* v. *Saunders*. (5)]

Counsel did not press for rescission of the contract.

Astbury, Q.C., and *R. B. Yardley*, for the plaintiff. The position of the purchaser is that his tenant is committing a breach of covenant, which is also a criminal offence, and he must be at the trouble of turning him out. Is that a sufficient

(1) [1899] 1 Ch. 879.
(2) (1866) L. R. 1 Ch. 433.
(3) (1834) 1 Ad. & E. 822; 40 R. R. 444.
(4) (1847) 4 C. B. 783.
(5) [1892] 2 Q. B. 452.

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hardship to induce the Court to withhold specific performance? We submit not. Specific performance has been granted in cases involving very serious hardship upon the purchaser, as, for instance, where an apparently valuable mine has turned out to be worthless: *Haywood* v. *Cope* (1); *Jefferys* v. *Fairs* (2); and see *Tamplin* v. *James*. (3) The observations of Wigram V.-C. in *Lucas* v. *James* (4) apply to a defect in the subject-matter of the contract itself as well as to a depreciation in value by reason of a nuisance in the neighbourhood. The question whether specific performance will be granted or withheld depends upon the vendor's knowledge of the defect. There is here no mistake or misdescription.

Eve, *Q.C.*, in reply.

LINDLEY M.R. I feel rather strongly that this is a case in which it would be wrong to decree specific performance. It would be little short of a scandal, to my mind, if the Court, having the power of refusing the extraordinary remedy of specific performance, were to thrust down the throat of an innocent buyer the obligation of becoming the landlord of a brothel. I acquit the plaintiffs of anything like deception. They are trustees for sale, and they were perfectly ignorant of the nature of the house which they put up for sale; but they did put up for sale property which they described as "an eligible freehold house fit and proper for investment"—I do not attach any importance to the word "eligible": it is the ordinary auctioneer's language; but still, there it is—"subject to a quarterly tenancy of 55*l.* a year." They did not know of anything which would make it oppressive or objectionable to require specific performance of that contract when that contract was made. They did not know that the person who was in possession of the house, and who was their tenant subject to the term of a quarter's notice, had been convicted of keeping a brothel, and that he was still keeping it. I do not say that they ought to have known. They probably were gentlemen living at a distance, and knew nothing at all about it. That

(1) (1858) 25 Beav. 140, 150.
(2) (1876) 4 Ch. D. 448.
(3) (1880) 15 Ch. D. 215.
(4) 7 Hare, 410, 418.

observation also applies to the purchaser. When he entered into the contract to buy this house he had no notion that he was entering into a contract which would put him in the position of a person buying a brothel. That never entered into his mind, and he was no more to blame for not finding it out than the vendors. But before the time came for completion he did find it out, and he refused to complete.

Now it is said that, having regard to the authorities, the objection he has raised is one which ought not to prevail. I am not prepared to say that his counter-claim by which he asks to set aside the contract on this ground can be supported. I am of opinion that it cannot. Neither am I prepared to say that the plaintiffs could not maintain an action for damages, if any were sustained, for breach of contract. As to that I say nothing. But, when the Court is asked to exercise the extraordinary jurisdiction it possesses in the way of specific performance, then I say that the objection which has been raised is one which ought to induce the Court to hold its hand. Just consider the position quite apart from the legal aspect of the case, to which I will refer presently. A man who becomes the landlord of a brothel is not in an agreeable position as regards character: there is an obloquy, a stigma attaching to it which he ought not to be called upon to bear. Then, looking at his legal liability, we find that under the Criminal Law Amendment Act, 1885, although he does not let the house as a brothel, still, knowing the facts, he will be liable as the lessor of a brothel to be fined unless he evicts the tenant. Is that the position in which this Court ought to put an innocent man who buys a house described as an eligible freehold investment? I say, No. I do not say we have not jurisdiction to do it; but I say it would be contrary to those principles of justice and fairness by which this Court is always guided in exercising that extraordinary jurisdiction.

We have been referred to several authorities, but the only one of any importance is the case of *Lucas* v. *James* (1), which to my mind is distinguishable. There a house in Curzon Street was put up for sale, and a gentleman bought it. Then

(1) 7 Hare, 410.

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he found out, not that that house was a brothel, or that there was anything amiss with it, but that some few doors off there was a disreputable house, and, not liking the neighbourhood, he refused to complete. It is unnecessary to say whether the decision in that case was right or wrong, and I express no opinion upon it; but it was a totally different case from this, and the ground on which I wish to put my judgment is this: that this Court will not compel a man to buy a property which, if he takes no steps to prevent it, will expose him, as owner, to criminal proceedings by reason of its state at the time of the sale. If he knows or ought to know the state of the property, that proposition may not apply; but to force that position upon an innocent purchaser would be wrong.

VAUGHAN WILLIAMS L.J. I am of the same opinion. I do not think it necessary to add anything.

ROMER L.J. I feel more doubt about the case than the Master of the Rolls, but I do not differ from his judgment.

LINDLEY M.R. The action and the counter-claim will be dismissed without costs. The appellant will have the costs of the appeal.

Solicitors: *Attree, Johnson & Ward; Shoubridge & May.*

H. B. H.

In re WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY.

[1897 W. 0124.]

C. A. 1899 BYRNE J. *March* 26; *May* 2, 3, 9. C. A. 1900 *Jan.* 23, 30.

Practice—Costs—Railway Company—Receivership Order—"Proper Outgoings in respect of the Undertaking"—Costs of Defending an Action in respect of the Undertaking—Costs of Proceedings under Act of Parliament containing no Provision for Costs—Jurisdiction—Railway Companies Act, 1867 (30 & 31 *Vict. c.* 127), *s.* 4—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

An order was made under s. 4 of the Railway Companies Act, 1867, upon the application of a judgment creditor, appointing a receiver and manager of the undertaking of a railway company, and directing the usual inquiries as to the debts of the company and the rights and priorities of the creditors. At the date of this order there was pending an action by the contractor of the line against the company for his remuneration. Subsequently an order was obtained by the contractor giving him liberty, notwithstanding the receivership order, to proceed with the action, and giving the company liberty (according to the construction placed by the Court upon the order) to defend the action on behalf of all persons interested in the assets of the company. The action resulted in a substantial reduction of the contractor's claim, and each party was ordered to pay his own costs:—

Held, (1.) that the costs of defending the action were not "proper outgoings in respect of the undertaking" within s. 4 of the Railway Companies Act, 1867; (2.) that, notwithstanding the absence of any mention of costs in the Act, the Court had jurisdiction to order payment of the costs of proceedings thereunder; (3.) that the costs of defending the action incurred since the date of the receivership order ought to be treated as incurred in prosecuting the inquiries directed by that order, and were incurred for the benefit of the debenture-holders and other creditors of the company, and ought to be paid out of the moneys in the hands of the receiver and manager in priority to their claims.

Order of Byrne J. varied.

In this case an order was made on September 8, 1897, under the provisions of the Railway Companies Act, 1867 (1), upon

(1) Sect. 4 of the Railway Companies Act, 1867, prohibits the rolling stock of a railway company being taken in execution by a judgment creditor, and it continues as follows: "But the person who has recovered any such judgment may obtain the appointment of a receiver and, if necessary, of a manager, of the undertaking of the company, on application by petition in a summary way to the Court of Chancery . . . . and all money

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the petition of the Great Central Railway Company, judgment creditors, appointing a manager and receiver to manage the undertaking of the Wrexham, Mold and Connah's Quay Railway Company, and to receive the tolls and sums of money arising out of the said undertaking; and it was ordered that the receiver and manager should, out of the money to be received by him, pay all expenses, if any, proper and necessary to be paid by him for the maintenance, management, and working of the said railway, and other proper outgoings in respect of the said undertaking, and the costs of the petitioners and of the respondents to the petition to be taxed by the taxing master; and inquiries were directed, first, what was due to the petitioners upon their judgment debt, and, secondly, whether there were any other and what debts of the respondents, and whether the same, and which of them, were incumbrances or charges on the undertaking or tolls and moneys arising out of the same, and how the same were respectively credited, and what were the rights and priorities of the persons for the time being interested therein. Prior to that order being made an action had been commenced by the executors and trustees of the will of Benjamin Piercy, the contractor of the line, against the Wrexham company for the purpose of enforcing certain claims against the company (amounting to 60,000*l.* in cash, and including, also, further sums in stock and debenture stock of the company) in respect of his remuneration for constructing the railway; and on July 25, 1897, an order of reference to arbitration was made in that action, and the arbitration was pending at the date of the order of September 8, 1897. Advertisements for creditors were issued in the proceedings under that order, and Piercy's trustees lodged a claim against the Wrexham Company founded upon the action. On November 16, 1897, a summons was taken out by Piercy's trustees in this matter asking that, and notwithstanding the

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received by such receiver or manager shall, after due provision for the working expenses of the railway and other proper outgoings in respect of the undertaking, be applied and distributed under the direction of the Court in payment of the debts of the company and otherwise according to the rights and priorities of the persons for the time being interested therein . . . ."

order of September 8, 1897, and the advertisement for creditors to prove their claims in pursuance of the said order, they might be at liberty to carry on the action and to proceed with the arbitration, and in the alternative as to how the claim of the said trustees against the said railway company was to be determined. The respondents to this summons were the Wrexham Company and the petitioning creditors, the Great Central Railway Company. On November 22, 1897, an order was made upon the summons to this effect, as appeared by the master's indorsement: "Order for liberty as asked within, and to include also liberty to the Wrexham, &c., Railway Company to continue to attend the proceedings by arbitration, claimants' costs to go with their claim." Accordingly the arbitration was proceeded with, and an award was made; and on March 15, 1898, judgment was entered up in the terms of the award, which, so far as material, was to the effect that the company should within a month pay and issue to the trustees the sum of 23,643*l.* cash, the sum of 6933*l.* in ordinary fully paid-up stock of the company, the sum of 1733*l.* in perpetual 4 per cent. preference stock of the company, and the sum of 4286*l.* in debenture stock of the company, and each party was to pay his or their own costs of the proceedings.

An application was now made on behalf of the Wrexham Company and the directors, and Mr. Pollitt, the solicitor for the company in the proceedings, asking for a declaration that the claim of the applicant Pollitt for the amount due to him in respect of his bill of fees and disbursements up to September 8, 1897, and also subsequently thereto, as the solicitor for the Wrexham Company, and incurred in the defence of the action and arbitration and the proceedings consequent thereon, and of this application, should be treated by the receiver and manager as proper outgoings directed to be paid in the first instance out of the moneys received by him in priority to any payments to debenture stockholders of the company.

The summons came on for hearing before Byrne J. on March 26, 1899.

Farwell, Q.C., and *R. J. Parker*, for the applicants.

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Neville, Q.C., and *F. Thompson*, for Piercy's trustees and for the A debenture stockholders.

Whinney, for the C debenture stockholders.

Mark Romer, for the Great Central Railway Company.

Cur. adv. vult.

1899. May 9. BYRNE J., after stating the facts substantially as above, proceeded:—The substantial question for determination is whether or not Mr. Pollitt's costs are "working expenses of the railway or other proper outgoings in respect of the undertaking" within the meaning of s. 4 of the Railway Companies Act, 1867.

I am of opinion that they are not, and it appears to me that the reasons given for the decision of Kay J. and of the Court of Appeal in the case of *In re Eastern and Midlands Ry. Co.* (1) afford me a sufficient guide in coming to this conclusion, and I refer particularly to the following passage in the judgment of Kay J. (2): "Now, taking a general view of the nature of the enactment, which I will notice more in detail presently, what could be more reasonable or proper than that the Legislature should provide absolutely, as against every person interested in the railway, whether as debenture-holder, mortgage-holder, or judgment creditor, that the receipts of such receiver and manager should be dealt with as directed by the Act? From the bare outline of the case as I have stated it, it follows that these receipts would probably have no existence whatever if it were not for this Act of Parliament. But for the Act of Parliament the judgment creditor might prevent the company carrying on business at all by seizing all its rolling stock. The railway company would be absolutely powerless if this rolling stock were taken away from it. Therefore, the receipts of the receiver and manager are practically in that sense created by the Act of Parliament. The judgment creditor, instead of seizing the rolling stock and selling it and paying himself or any other judgment creditor, is now prevented from seizing the rolling stock. The object of the Act

(1) (1890) 45 Ch. D. 367. (2) 45 Ch. D. 379.

is to enable the company to carry on its business notwithstanding the judgment creditor, because it is, after all, for the benefit of the judgment creditor and also of everybody else interested in the line that its working should not be stopped, but should be carried on, though under the direction of an officer of the Court. Then the receipts of that officer of the Court are receipts which he comes into possession of under and by virtue of this Act of Parliament, and there is nothing unreasonable (the object of the Act evidently being to enable the line to be carried on) in the Act saying that the first thing he shall do with these receipts is to pay the working and other expenses necessary for carrying on the line." And (1) he says, after citing *In re Cornwall Minerals Ry. Co.* (2): "But, apart from that case, how can it be said these are not working expenses and proper outgoings without which the line cannot be carried on? That is the test."

Applying that test to the present case, how can I say that the costs of Mr. Pollitt are working expenses or proper outgoings without which the line could not be carried on?

It is, I think, obvious that the undertaking could have been carried on just as well and just as effectually, although the claim of Piercy's trustees had not been resisted at all. I am far from saying that it was not right and proper that the claim should have been resisted and resisted in the way that it was. So far as the materials I have enable me to judge, I see no reason to doubt that benefits may have accrued to some if not to all of the creditors of the company from such defence, and I desire to guard against its being supposed that I am deciding that these costs may not hereafter be rightly and properly provided for, just as the costs of resisting any claim carried in in the proceedings might have been, and just as undoubtedly at the proper time the Courts will have jurisdiction to provide for other proper costs in relation to proceedings in this matter, assuming that there are funds properly applicable for the purpose.

But I am now asked to anticipate the usual period for determining what costs ought to be paid, in what order, and out of

(1) 45 Ch. D. 385. (2) (1882) 48 L. T. 41.

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what funds, upon the footing that the costs in question are "other proper outgoings" within the meaning of the section. These costs are not current expenses payable in order to keep the undertaking going; and, without expressing any opinion upon the point whether any, and if any what, costs might be, under other circumstances, payable under the head of "other proper outgoings," I am of opinion that the applicants fail in respect of their contention upon this head.

G. M.

C. A.

The applicants appealed. The appeal came on for hearing on January 23, 1900.

R. J. Parker (*C. A. Russell, Q.C.*, with him), for the applicants. The word "undertaking" in s. 4 must receive a liberal construction, since otherwise innumerable difficulties would arise in the working of the company. The debenture stockholders and the judgment creditors, who under this section rank pari passu, are interested in seeing that no judgment is improperly obtained against the company, and they were, therefore, interested in the defence of this action.

In the normal course, this action would have been stayed from the date of the receivership order, and the claim of the contractor would have been resisted in chambers by the receiver. Instead of that, leave has been obtained by the company to go on with the defence. The costs of defending this action are in the same position as costs, charges, and expenses incurred by the receiver, and it was a mere matter of arrangement that the claim was resisted by the company instead of by the receiver. The costs of everything that the Court would authorize the receiver to do are proper outgoings in respect of the undertaking.

[LINDLEY M.R. That would not include the costs incurred before the date of the receivership order.]

I admit that those costs stand on a different footing.

The receipts of a receiver appointed under this section are a statutory creation, and, if the receiver is not to get his costs as proper outgoings in respect of the undertaking, it is difficult to see how he is to get them except as ordinary simple contract

debts, since the statute contains no provision as to costs. The word "undertaking" in this section must have a meaning analogous to that ascribed to it by Lord Cairns in *Gardner* v. *London, Chatham and Dover Ry. Co.* (1) The definition of Kay J. in *In re Eastern and Midlands Ry. Co.* (2), upon which Byrne J. relied, is too narrow, and gives to "proper outgoings in respect of the undertaking" no wider meaning than to "working expenses," and his observations were not necessary to the decision of the case, which was a decision upon working expenses. I submit that proper outgoings include the costs of bringing and defending actions which are properly incident to the working of the undertaking.

[VAUGHAN WILLIAMS L.J. In *In re Navan and Kingscourt Ry. Co.* (3) the service of the public was taken to be the test.]

We are dealing with that part of the section which was not enacted for the benefit of the public, but for the benefit of judgment creditors of the railway.

Neville, Q.C., and *Frederic Thompson*, for Piercy's trustees and for the A debenture stockholders. There is no ground for treating these costs as though they were costs incurred by the receiver; and, further, the costs of the receiver do not come within the definition of proper outgoings. The test is, can the line be carried on without them? It is for the interest of all alike that the railway should be carried on, and, in order to understand the meaning of the section, it is necessary to bear in mind the distinction between gross returns and net returns. Working expenses and proper outgoings come out of the receipts before the receiver's own remuneration, the whole object of the Legislature being to keep the line open.

[ROMER L.J. Is it not also to keep the undertaking going? There is nothing to limit the outgoings to expenses necessary for the working of the line.]

The undertaking which the receiver is to receive under this section is the material undertaking, and the object of using the word "undertaking" is to provide for the case of a railway company carrying on some subsidiary business in connection

(1) (1867) L. R. 2 Ch. 201, 216. (2) 45 Ch. D. 367.
(3) (1885) 17 L. R. Ir. 398.

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with the railway—e.g., the business of dock owners. That this is the true meaning of "undertaking" as used in this section appears from *In re Birmingham and Lichfield Junction Ry. Co.* (1)

The debenture stockholders are not interested in the costs payable by the company to Mr. Pollitt, and under the Act they are entitled to be paid in priority to these costs.

Whinney, for the C debenture stockholders in the same interest. Sect. 22 contains a provision for making rules for the regulation of the practice under the Act, and rules have been made in pursuance of this section. Part II. of the rules relates to the "Protection of Rolling Stock and Plant." Part III. is headed "General Provisions," and there is there a provision as to costs. The applicants cannot come in under "proper outgoings," but come in under the provision in the rules.

Mark Romer, for the Great Central Railway Company.

Parker, in reply.

Cur. adv. vult.

Jan. 30. LINDLEY M.R. This is a case of some novelty and some little difficulty, and it gives rise to the question of how certain costs incurred by a railway company in defending an action are to be paid, having regard to the fact that an order appointing a receiver and directing inquiries has been made under the Railway Companies Act, 1867. Sect. 4 of that Act stopped the breaking up of a company by the seizure of its rolling stock, and provided that instead of doing that a judgment creditor might apply for and obtain a receiver, and, if necessary, a manager, by a petition to the Court of Chancery. Then the Act went on to say how the receiver was to deal with the money he received from the undertaking. [His Lordship read the latter portion of s. 4, and continued:—] Rules have been made for carrying that Act into effect, and the common form of order has been, ever since the Act was passed, to appoint a receiver, and, if necessary, a manager, and to direct inquiries for the purpose of ascertaining how the assets

(1) (1881) 18 Ch. D. 155.

ought to be distributed; and in this particular case those inquiries have been directed. [His Lordship read the order of September 8, 1897.]

Now, the Act says nothing at all about costs, and, if there were no jurisdiction to give costs, I suppose nobody would get any costs under this Act of Parliament; but of course that cannot be the effect of the Act. Somewhere or other there must be some power to order payment of the costs of and consequent on the petition, and, ever since the Act of 1867 has been passed, orders have been made for the payment of those costs; and in this particular case there was an order for payment of those costs out of the moneys in the hands of the receiver. Where is the jurisdiction to do that? You cannot find it in the Act; but that section of the Act of Parliament, like other sections, was passed upon the footing that the Court has jurisdiction to order costs in those cases, and the Court has always exercised it. Any doubt there may be as to the jurisdiction of the Court to order costs, in distributing funds under an Act of Parliament which says nothing about costs, is removed by that important section which was put into the Judicature Act, 1890—s. 5. [His Lordship read the section.] That section was passed in consequence, as was explained by this Court in *In re Fisher* (1), of a doubt which had arisen as to the jurisdiction of the Court of Chancery to order costs under special Acts of Parliament relating to the compulsory purchase of land, and the object of that section was to remove that doubt. As I understand that section, as I said in *In re Fisher* (1), where there is an Act of Parliament relating to funds to be distributed and proceedings to be taken for the purpose of having them distributed according to the Act, the Court which has to make the distribution and apportion the money has jurisdiction over the costs, and must make the proper order for the payment of them. Therefore, although this Act of Parliament says nothing about costs, I have not the slightest doubt that the practice, which has prevailed from the beginning, of ordering costs to be paid out of the funds in the hands of the receiver is perfectly justifiable; and, as I say, if there was before any doubt on the

(1) [1894] 1 Ch. 450.

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matter, that doubt is removed by the Judicature Act of 1890. [His Lordship stated the facts down to and including the order of November 22, 1897, and continued as follows:—]

The first question we have to consider is, What was the meaning of that order? I cannot help thinking that the true meaning of it was that the company should not only attend the proceedings, which was an order not worth making, but should oppose the proceedings, and do as it had been doing up to that time—fight the claim of the contractor's executors, and fight it on behalf of everybody interested in the assets of the company. We cannot doubt for a moment that that was the real meaning of the parties and of the order itself. We all regard it as an order—an arrangement, because I daresay it was arranged — that the company should oppose and fight that claim in the arbitration in the interests of everybody rather than that the matter should be brought into chambers and fought all over again. [His Lordship stated the effect of the award and read the summons, and continued:—]

The question is, How are the costs of defending that action to be obtained? Byrne J. decided that these costs were not such costs as could be fairly and properly regarded as "other proper outgoings in respect of the undertaking," and he dismissed the summons. The applicants appealed, and raised the same contention before us—that these costs ought to be regarded as proper outgoings in respect of the undertaking; but we feel the same difficulty that Byrne J. did. They are certainly not "working expenses of the railway," and, without going so far as to say, as Kay J. did in *In re Eastern and Midlands Ry. Co.* (1), that "other proper outgoings" must be substantially the same thing as working expenses, it would be stretching the ordinary meaning of the words "other proper outgoings in respect of the undertaking" to say that they included the costs of litigation in respect of the undertaking. We are not prepared to do that, and therefore we do not differ from the construction put by Byrne J. upon this section.

But it does not follow that no provision is to be made for these costs, and, taking the view which we do of the order

(1) 45 Ch. D. 367.

giving the company leave to attend, and treating that as an authority to defend for the benefit of all the debenture stockholders, we are of opinion that these costs incurred since the order appointing a receiver and manager should be regarded as costs of the proceedings in the matter of the Railway Companies Act, and that they should have priority over the payment to the debenture stockholders who have resisted this application. The applicants claimed priority also for costs incurred before that date; but they are clearly not entitled to priority for those costs, which would be ordinary debts of the company. Therefore, we vary the order of Byrne J. by adding a declaration that the costs incurred by the Wrexham, Mold and Connah's Quay Company in defence of the action and in the arbitration in such action and proceedings consequent thereon since September 8, 1897, ought to be treated as incurred in prosecuting the inquiries directed by the order of September 8, 1897, made in the above matter, and were incurred for the benefit of the debenture stockholders and other creditors of the Wrexham Company, and ought to be paid, with the costs of this appeal, in priority to any future payments to them or any of them. Then there ought to be liberty to apply to the judge to whose Court the proceedings in this matter are attached for payment of those costs.

VAUGHAN WILLIAMS L.J. I entirely agree with my Lord in the result of his judgment, and also in the reasons he has given for it.

ROMER L.J. I agree. I should like to add this: I think it is covered by what the Master of the Rolls has said, but I should like to make it perfectly clear. It does not follow from our judgment that all costs incurred by parties to this order or to the inquiries thereby directed would of necessity be paid in priority to the claims of the debenture stockholders, or of the judgment creditors. For example, I can well understand that some costs under the order, or in carrying out, or in answering the inquiries thereby directed, may have been incurred under such circumstances as would shew that they were really

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incurred for the benefit, not of the debenture stockholders, but say of the judgment creditors and those ranking after them. In a case like that I think the costs would be provided for, but would not be provided for in priority to the debenture stockholders. Or, again, costs might be incurred by the company which were not really for the benefit of the debenture stockholders or judgment creditors, in which case those costs would be provided for after providing for the costs of the debenture-holders and the judgment creditors. In the present case, why we have given these costs in priority to the claims of the debenture stockholders, and the judgment creditors, and the ordinary creditors, and the shareholders, is because, as pointed out by the Master of the Rolls, the costs were really incurred for the benefit of all those classes.

LINDLEY M.R. I quite agree with that.

Solicitors: *Norris, Allens & Chapman, for J. B. Pollitt, Manchester; Field, Roscoe & Co., for Evan Morris & Co., Wrexham; Sharpe, Parker & Co., for Alsop, Stevens, Harvey & Crooks, Liverpool; Cunliffes & Davenport, for R. B. Lingard-Monk, Manchester.*

H. B. H.

SOUTH AFRICAN BREWERIES, LIMITED *v.* KING.

C. A. 1900 Feb. 2.

[1899 S. 175.]

Conflict of Laws—Contract—Locus Solutionis—Locus Contractus—Form of Contract—Contract to be Performed in Different Countries.

By an agreement in writing executed at Johannesburg, in the South African Republic, and made between a company having its registered office in London, but carrying on business in South Africa, and a British subject resident at Johannesburg, the latter agreed to serve the company as brewer or otherwise in its business carried on at Johannesburg and in the Colony of Natal and elsewhere in South Africa, and provision was made for his residence in Johannesburg. The agreement was framed in the English language and was in English form :—

Held, that the rights of the parties under the agreement ought to be governed by the law of the South African Republic.

Decision of Kekewich J., [1899] 2 Ch. 173, affirmed.

APPEAL by the plaintiff company against a decision of Kekewich J. (1)

The action was brought for an injunction to restrain the defendant from carrying on the business of a brewer in South Africa in breach of a stipulation contained in an agreement for service dated April 11, 1895.

The defence was that the stipulation was void, if not according to English law at any rate according to the law of the South African Republic, as being in restraint of trade.

The agreement was executed in Johannesburg and was made between the South African United Breweries, Limited, which was a company having its registered office in London, but carrying on business in South Africa, and the defendant, a British subject, therein described as "of the Castle Brewery, Johannesburg, in the South African Republic," being the brewery of the said company.

By clause 1 the defendant agreed during a term of five years from October 1, 1894 (determinable on the part of the company as thereinafter mentioned), to "serve the company as

(1) [1899] 2 Ch. 173.

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brewer or otherwise in their business carried on at Johannesburg and in the Colony of Natal and elsewhere in South Africa." By clause 2 he agreed to "diligently and faithfully observe the lawful orders and instructions of the company in relation to their said business." By clause 5 the company agreed to provide the defendant with suitable living accommodation either at the brewery or in a respectable house in Johannesburg; and by clause 6 the defendant agreed to occupy the quarters provided by the company so long as the company desired him to do so. By clause 8 the defendant agreed not to engage in any brewing business in South Africa within a period of ten years from the termination of his engagement except with the consent in writing of the board of directors in London of the company. This agreement was framed in the English language and was in English form.

At the date of this agreement the defendant had been engaged for upwards of two years in Johannesburg upon the business of the South African United Breweries, Limited, or its predecessors in title, he having arrived at Johannesburg from England in November, 1892.

In May, 1895, the South African United Breweries, Limited, was reconstructed and the whole of its undertaking, including the benefit of the agreement, was taken over by the plaintiff company.

Kekewich J. held that the contract ought to be governed by the law of the South African Republic and adjourned the further trial of the action to give the parties an opportunity of producing evidence with respect to that law.

Warrington, Q.C. (*Younger, Q.C.*, with him), for the plaintiff company, repeated the arguments urged in the Court below.

Buckmaster, for the defendant, was not called upon.

LINDLEY M.R. I think the conclusion at which the learned judge has arrived in this case is unquestionably right. It appears to me to be quite impossible to decide what the rights of the parties are with reference to the 8th clause of this agreement without knowing what the law of the Transvaal is. Not-

withstanding the first clause, which at first sight looks as if it were the duty, or might be the duty, of the defendant to act as a brewer and conduct the brewing business in Natal or elsewhere in South Africa besides Johannesburg, it is to my mind extremely doubtful, upon looking at the other clauses, whether that would be his duty. I do not say that he might not be ordered to go there to supervise temporarily, because he is bound to perform or attend to the orders which are given to him, and it is possible that he might; but, looking at clauses 5 and 6, I doubt very much whether it is in accordance with this agreement that he was to go and act as a brewer anywhere but at Johannesburg. However, be that as it may, Johannesburg is the primary place to which this contract refers. There is no question about that; and that being so, and having regard to the fact that the defendant was settled there at the time and that this contract was entered into between him at Johannesburg and the company's representative at Johannesburg, I think that clause 8 cannot possibly be independent of the Transvaal law. I think, therefore, that the appeal fails and must be dismissed with costs.

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VAUGHAN WILLIAMS L.J. I entirely agree.

ROMER L.J. I agree.

Solicitors for plaintiffs: *Loughborough, Gedge, Nisbet & Drew.*

Solicitors for defendant: *H. G. Campion & Co.*

H. B. H.

C. A. 1900 Jan. 20, 22.

ATTORNEY-GENERAL *v.* BRIGHTON AND HOVE CO-OPERATIVE SUPPLY ASSOCIATION.

[1898 A. 582.]

Highway—Obstruction—Reasonable User—Loading and Unloading of Goods—Injunction.

In a case of doubt or difficulty the right of the occupier of premises abutting on a highway to make a reasonable use of it, for the purpose of loading and unloading goods at his premises, must yield to the public right of unobstructed passage along the highway.

It is in each case a question of degree whether the exercise of this private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable, and in determining this question regard must be had to all the facts of the case.

Traders carrying on a large business in a populous town, at premises situate in a street the roadway of which was less than twenty feet wide, kept as many as six vans at once during every alternate hour in the daytime loading and unloading goods at their premises, thus occupying half the width of the street, and seriously obstructing the passage of vehicles through it:—

Held, that this was an unreasonable use of the highway, and that it amounted to a public nuisance the continuance of which must be restrained by injunction.

Appeal against a decision of Kekewich J.

The action was brought by the Attorney-General, at the relation of James Pack, and by James Pack, as plaintiffs.

The defendants carried on their business, which was that of a co-operative store, in premises situate in and abutting upon Lansdowne Street, in the urban district of Hove, adjoining Brighton, Sussex. The street was a public highway. It was rather less than twenty feet in width. The plaintiff James Pack carried on the business of a lodging-house keeper in a house situate in the same street. The defendants for the purposes of their business employed a number of vans, which were loaded with goods and unloaded in front of their premises. The plaintiffs alleged that for the purpose of so loading and unloading the vans were drawn up close to the footway abutting on the defendants' premises throughout the day, and were kept

in that position for a considerable time, and that there was almost continually throughout the day an accumulation of vans loading and unloading at the same time. In the course of loading and unloading the defendants carried over and deposited on the footway parcels and heavy packages. By the unreasonable and excessive user to which the defendants put the roadway and the footway, and the obstruction thereby arising, they caused a serious nuisance to the persons residing in Lansdowne Street, and to all members of the public who had occasion to pass along it.

The plaintiffs claimed an injunction to restrain the defendants, their servants, &c., from causing a nuisance to the public and to the plaintiff James Pack—(1.) By wilfully obstructing and putting to excessive and unreasonable user the public highway called Lansdowne Street. (2.) By wilfully obstructing and using, to the interference with and danger of the public, the footway on the side of the street.

The plaintiff James Pack also claimed damages.

By their defence the defendants said that they lawfully, properly, and reasonably used the portion of the highway opposite their premises in Lansdowne Street in loading and unloading a limited number of their vans and carts, and they admitted that in the ordinary course of their business, and in the lawful, proper, and reasonable use of the highway, they carried over the footway parcels and packages; but they denied that they deposited any parcels or packages upon the footway. In all other respects the defendants denied the allegations made by the plaintiffs.

The effect of the evidence given at the trial of the action appears in the judgment of the Master of the Rolls.

At the trial the claim of the plaintiff James Pack to damages was abandoned.

Upon the evidence Kekewich J. held that the defendants were making an unreasonable use of the highway, and thus causing a public nuisance. During the greater part of the day, for all practical purposes the whole of the day, six vans or more were drawn up at the defendants' premises, thus occupying a large portion of a narrow highway breadthways,

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and also necessarily occupying a large portion of it lengthways. The vans were drawn up so that the back or tail end was next to the footway, the horses being generally turned at right angles, so that their heads faced up or down the street. The defendants took up half the highway for practically the whole of the day. It was said that, if they could not carry on their business in this way, they could not carry it on at all. The answer was that, if they could not carry on their business without an unreasonable user of the highway, they must find other premises. There was evidence of inconvenience to the public, and that carriages had entered the street and had turned back again because of the obstruction. There was also evidence that from time to time large packages had been left on the pavement, so that persons could not pass by.

Kekewich J. dismissed the action without costs, so far as it was an action for damages by James Pack, and granted a perpetual injunction restraining the defendants, their servants, &c., from causing a nuisance to the public by wilfully obstructing and putting to excessive and unreasonable user the public highway, or by wilfully obstructing and using, to the interference with and danger of the public, the footway on the side of the street.

The defendants appealed.

Warmington, *Q.C.*, and *A. Beddall*, for the defendants. The evidence does not prove that the defendants have been making an unreasonable use of the highway. There is no evidence of inconvenience to the public generally. Access to premises abutting on a highway for the purpose of loading and unloading goods is a legitimate user of a highway, and the occupier of such premises is entitled to use the highway for that purpose so long as he does not improperly interfere with the rights of his neighbours or the general public. The public right of passing and repassing along the highway is subject to this right of the owner or occupier of premises abutting on it: *Rex* v. *Russell* (1); *Attorney-General* v. *Sheffield Gas Consumers Co.* (2); *Original Hartlepool Collieries Co.* v. *Gibb* (3); *Rex* v. *Cross* (4); *Rex* v.

(1) (1805) 6 East, 427; 8 R. R. 506.
(2) (1853) 3 D. M. & G. 304, 339.
(3) (1877) 5 Ch. D. 713, 721.
(4) (1812) 3 Camp. 224; 13 R. R. 794.

Jones. (1) The evidence shews that the defendants' vans give way when any one wishes to pass along the street. The plaintiffs' witnesses say that, if there were only one van loading or unloading at one time, the obstruction would be equally objectionable. The principle is the same whether the Attorney-General or a private individual is the plaintiff in the action. The evidence shews that the general traffic through the street is but small. The right of loading and unloading goods at premises abutting on a highway is not affected by the circumstance that the street is a narrow one. A large commercial association, such as that of the defendants, which carries on a business equal in amount to that of several ordinary tradesmen, must surely be entitled to load and unload as many vans as are necessary for the carrying on of their business, provided that they do this as quickly as is possible. This is a legitimate user of the street. There are many streets in the City of London so narrow that, if only one van were loading or unloading, there would not be room for any other vehicle to pass. The defendants are merely carrying on their business in a reasonable way, and keeping their vans stopping opposite their premises for a reasonable purpose and for a reasonable time, and there is no ground for the injunction.

Macmorran, Q.C., and *E. A. Parkyn*, for the plaintiffs, were not heard.

LINDLEY M.R. In my opinion it is quite impossible for us to reverse the judgment of the learned judge granting an injunction against the defendants, though I think the word "wilfully" ought to be omitted from the order. The substance of the case is this. The defendants carry on a large business, which is beneficial to the public as well as to the shareholders. They carry on the business of stores, supplying goods which the public require. The business is carried on in a street, the roadway of which is a little less than twenty feet wide. Their business has evidently increased of late years, and the plaintiffs complain that they obstruct this street. Let us see to what extent they do obstruct it, without reference to the

(1) (1812) 3 Camp. 230; 13 R. R. 797.

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question whether what they do is reasonable or unreasonable. They certainly block up one half of the street for some distance by placing in front of their premises as many as six vans at once. The vans are packed close together with the tail end towards the kerb, the vans projecting into the road. The horses of the vans are turned round as far as they can be, so as to leave as much room as possible beyond the vans. There is no obstruction at night—that is conceded—but during the daytime there are half-a-dozen vans, packed in the way which I have mentioned, in every other hour. They begin at 8.45 in the morning, and go on until 9.40. Then there is an hour clear; afterwards there is another hour of loading and unloading, and then there is another hour clear, and so on, every alternate hour during the daytime. From 8.45 A.M. down to 5.45 P.M. there is this accumulation of vans and horses, and there is the loading and unloading of goods across the foot pavement to such an extent that the footway is materially obstructed. There is evidence which cannot be disregarded that the passage of carriages along the street is obstructed. I do not mean to say that it is stopped for long, but there is such a nuisance that people avoid the street. There is evidence that carriages have turned back, and one witness at all events says that, if you drive through the street, you are very apt to be annoyed by the van-horses, which interfere with the passing horses. The passage left open is very narrow, and if there happens to be any vehicle in the passage when you want to pass you cannot pass at all. Upon these facts it is impossible to say that there is not, in fact, an obstruction of the right of way. Primâ facie that is enough to constitute a nuisance in point of law to a highway. The public have a right to pass and repass freely, and without obstruction, not only over the half of the street which is not occupied by the defendants' vans, but over the whole of the street. Of course, in all streets and in all populous places there must be a good deal of give and take, and it would be ridiculous to say that because one cart is standing opposite a house for a short time there is such an obstruction as to amount to a nuisance. That would be absurd, and the whole difficulty consists in

drawing the line. I will refer presently to what I consider to be the law. Now let us see what the defendants have to say for themselves, and they have a great deal to say. They say they are carrying on a lawful business, and carrying it on in a reasonable way, so reasonable that it is necessary, if they are to carry on their business here at all, that they should do pretty much what they are doing. It appears to me, looking only at the carrying on of their business, that what they are doing is perfectly reasonable. They have a large business; there is a great deal of loading and unloading to be done; they have a number of vans, and each cart is loaded and unloaded with fair despatch. No complaint is made about that. We have, therefore, to consider what is the consequence of the defendants' reasonable exercise of their right coming into conflict with the right of the public to the use of the highway. Now, I take the law to be that which was laid down, and I believe with perfect correctness, in *Rex* v. *Russell*. (1) The facts there were not exactly the same as here, but the passage which I am about to read appears to me to express in better language than I could employ what the law is, and it has the great advantage of having stood the test of nearly a hundred years of criticism. There the Court said: "It should be fully understood that the defendant could not legally carry on any part of his business in the public street to the annoyance of the public. That the primary object of the street was for the free passage of the public, and anything which impeded that free passage, without necessity, was a nuisance. That if the nature of the defendant's business were such as to require the loading and unloading of so many more of his wagons than could conveniently be contained within his own private premises, he must either enlarge his premises, or remove his business to some more convenient spot." I take that to be the law on the subject. What does it mean? It comes, in substance, to this—that in a case of doubt or difficulty, the private reasonable right of a householder to carry on his business must yield to the public right of user of the street. If the public right of user is, in fact, so obstructed that it cannot be used to the extent which the law

(1) 6 East, 427, 430; 8 R. R. 506.

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requires, then the private right must give way, and it is no answer to say that the defendants can go on using this street in a way which is reasonable, looking at their interests alone. It is urged that it is difficult to draw the line. I admit that it is extremely difficult. It may be said that, if a cart stands opposite a grocer's door for five minutes to take up goods, it is obstructing the street, and, of course, it is doing so to a certain extent. But in such a case it would be ridiculous to say that there was an indictable or an actionable nuisance, or a ground for an injunction. It is always a question of degree. It may be asked, What is the difference between one cart and two, and so on? You cannot draw the line in that way. Nothing is more common in life than to be unable to draw the line between two things. Who can draw the line between plants and animals? And yet, who has any difficulty in saying that an oak-tree is a plant and not an animal? When, however, we look at the facts of the present case, there is clearly such an obstruction as to block up the street for so long and so much that people avoid it rather than face the inconvenience of going along it, and that, to my mind, is utterly unjustifiable. I think the injunction ought to be affirmed with the variation which I have already mentioned, and the appeal ought to be dismissed with costs.

The defendants must so arrange their business as not to commit a nuisance.

VAUGHAN WILLIAMS L.J. I agree. I agree because I regard the decision of the learned judge in the Court below as given upon a question of fact as to which there was evidence before him. I should not have agreed if his decision had been of a question of law resulting from the facts proved by the evidence. I think it is right to make the observations which I am about to make, because I cannot help feeling that our present decision is one of great public importance in all populous places in which commercial business is conducted, and I do not wish it to be said hereafter that there is a decision of the Court of Appeal which shews that it is unlawful to do the particular acts which have been done by the defendants.

If that were our decision I should hesitate long before I could assent to it, because I think it would be a very serious blow to the interests of the public throughout the kingdom, by preventing commercial business from being securely carried on in crowded neighbourhoods. That there has been a physical obstruction in the present case is beyond a doubt. There was less room in the highway by reason of what the defendants did. There was a displacement by the presence of the defendants' vans. But the action could not be maintained merely by shewing that there was a physical displacement, or a physical reduction in the amount of space available for the public, during the period in which the defendants' vans were standing at their warehouse. In order to maintain this action it must be shewn not only that there was such a physical temporary displacement or reduction of the space available for the use of the highway by the public, but it must be shewn that that displacement or reduction was not consistent with the lawful user of the highway. Now a highway is intended primarily for the purpose of the passage of Her Majesty's subjects, but it is also for the purpose that those who pass along it shall be able to stop at the houses which abut on the highway and either take up or discharge goods or persons there. The fact that in doing this you temporarily reduce the width of the roadway does not make the act unlawful, and does not make your obstruction unlawful. It does not do so in a broad street, nor even in a narrow street. If in a street so narrow that it will only admit of one vehicle going along it and will not admit of two broad vehicles going along it, you have a cart drawn up at a house you are no doubt for the moment physically reducing that highway so that it is no longer available for the public during the time for which the cart is standing in the street. But it is no more unlawful to stop at a house in such a narrow street than to stop at a house in a wide street. In either case the lawful user of the highway includes access to premises which abut upon it. As regards the authorities, I do not think there can be found any case, at all events of an indictment, in which there has been a conviction upon evidence merely shewing an excessive

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or a very large user of a lawful right, as distinguished from an improper user of a highway. In *Rex* v. *Russell* (1) there was obviously an improper user of the highway. So, too, in *Rex* v. *Cross* (2) and *Rex* v. *Jones* (3) there was an improper user of the highway. But in each of those three cases the Court expressly asserted the right of access to houses, provided that it is reasonably exercised. In *Rex* v. *Jones* (3) Lord Ellenborough said (4): "If an unreasonable time is occupied in the operation of delivering beer from a brewer's dray into the cellar of a publican, this is certainly a nuisance. A cart or wagon may be unloaded at a gateway; but this must be done with promptness." And in each of the other cases the Court explicitly affirmed the lawfulness of such a user of the highway. So much for the common law cases. And in *Attorney-General* v. *Sheffield Gas Consumers Co.* (5) the same proposition was as plainly affirmed by Lord Cranworth L.C. On the other hand, it cannot possibly be said that no amount of user can constitute a nuisance if that user consists of an aggregate of lawful acts. The truth is that before you can answer the question, Was a particular user necessary or reasonable? you must always take into consideration all the facts of the case. If you are dealing with a narrow street—a single-carriage street—obviously it may be necessary to block up such a street much more than it can ever be necessary with a wide roadway. Again, if a railway company or the occupier of business premises have a yard in which they can load and discharge goods, that, I think, would be one of the circumstances which might be taken into consideration for the purpose of shewing that it was wholly unreasonable and unnecessary for them to obstruct the highway by loading or discharging their wagons at the kerb-side of the street. Again, one of the circumstances to be taken into consideration would be if a man had a business so large that the aggregate of the occasions upon which he might lawfully use the highway would substantially deprive the rest of the public of the use of the highway in the daytime. No

(1) 6 East, 427; 8 R. R. 506.
(2) 3 Camp. 224; 13 R. R. 794.
(3) 3 Camp. 230; 13 R. R. 797.
(4) 3 Camp. 231.
(5) 3 D. M. & G. 339.

one, I think, could doubt that that would be an unlawful obstruction, and not the less so because the unreasonableness of the proceeding is only demonstrated by shewing the effect upon the public of the number of occasions upon which he used the highway for his purposes. I agree with the decision of Kekewich J. because, as I understand, he, upon the evidence before him, has come to the conclusion that the user by the defendants of the street is unreasonable and unnecessary. Under those circumstances I agree with his decision.

ROMER L.J. I also agree in thinking that we ought not to interfere with the injunction granted by Kekewich J., subject to the clerical alteration which has been pointed out by the Master of the Rolls. No doubt any tradesman whose premises border on a highway is primâ facie entitled to use that highway in a reasonable manner for unloading and loading goods from and into carts for the purposes of his business. And such loading and unloading would not of necessity be an unreasonable user of the highway merely because it might cause a temporary obstruction, or some inconvenience to passers-by or others using the street. Whether the user by a tradesman of a highway for such purposes is reasonable or unreasonable is a question of degree—a question of fact to be determined in each particular case. It does not follow that because the user is necessary or useful for the purpose of carrying on the business it must of necessity be held to be a reasonable user. For example, suppose a man had established a very large business, requiring the use of an enormous number of vans, and his premises bordered on a very narrow street, it might well be that in order to carry on his business he would require to keep the highway exclusively for himself and his wagons the whole day long, so as not to allow any one else to come up or down the street. In such a case as that I should say that his user of the highway would not be a reasonable user, even though it might be necessary for his business. It would practically amount to an appropriation of the highway to himself for the purposes of his business. In the present case the question is whether the user by the defendants of this highway is or is

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not, looking at all the facts of the case, a reasonable user. In my opinion, on the evidence it is not reasonable, for I think that it practically amounts to an appropriation by them of at least half the highway for several hours in every day (except Sundays) exclusively for the purposes of their business, making it as it were a part of their business premises, a private yard of their own; and moreover, the evidence, in my opinion, shews that during those hours the defendants are also seriously interfering with the public user of even that portion of the highway which they do not occupy or appropriate to themselves. I am further satisfied that what the defendants are doing has caused and is causing considerable inconvenience to the public, insomuch that the public are beginning to cease to use this street because of the serious nature of the obstruction. In my opinion that which the defendants are doing amounts to an improper user of the highway, and it has been properly restrained by injunction.

Of course our order does not prevent the defendants from using the street for the purpose of loading and unloading goods in a reasonable manner. It only prevents them from committing a nuisance—that is, from using the highway in an unreasonable manner. Reasonable user is not a nuisance.

Solicitors: *Booth & Smee, for FitzHugh, Woolley, Baines & Woolley, Brighton; Radford & Frankland, for Woods & Holmes, Brighton.*

W. L. C.

NORTH J.
1899
Dec. 6, 7.

In re STAMFORD, SPALDING AND BOSTON BANKING COMPANY AND KNIGHT'S CONTRACT.

[1899 S. 2816.]

Vendor and Purchaser—Abstract—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.

Every document that forms a link in the vendor's title ought to be abstracted in chief.

Sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, presupposes a proper abstract, and does not apply to a document in the chain of title.

In an abstract of title to leaseholds, an assignment appeared only by way of recital in another document:—

Held, that an abstract of the recited assignment must be delivered at the vendor's expense.

In re Ebsworth and Tidy's Contract, (1889) 42 Ch. D. 23, considered.

THIS was a purchaser's summons under the Vendor and Purchaser Act, 1874, to determine whether he was entitled at the vendors' expense to an abstract of a document forming a link in the vendors' title, which only appeared on the abstract delivered to him by way of recital. The purchaser was Thomas Knight, the vendors the Stamford, Spalding, and Boston Banking Company.

The property was a pair of leasehold houses situated at Sydenham, purchased at auction; the only material condition of sale was: "The vendors will deliver to each purchaser, or his solicitor, an abstract of their title to the property purchased by him." An abstract was duly delivered to the purchaser. One abstracted document was an assignment dated November 26, 1890, by Henry Alchin to James Pugh and George Jason Phillips. The next abstracted document was an assignment dated November 17, 1891, from the assignee in bankruptcy of James Pugh to the vendors. The abstract of this document contained a recital of an assignment dated December 2, 1890, from George Jason Phillips to James Pugh of (inter alia) his interest in the leasehold premises the subject of the contract.

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The purchaser required an abstract of the assignment of December 2, 1890; the vendors refused to deliver the abstract except at the purchaser's expense; the object of the summons was to determine whether they were bound to deliver the abstract at their own expense.

Wright Taylor, for the purchaser. The purchaser is entitled to have every document forming a chain in his title abstracted in chief; the abstract of a mere recital of document is not sufficient; otherwise the vendor might simply abstract the conveyance to himself, setting out the recitals: Dart on Vendors and Purchasers, 6th ed. p. 341; *Oakden* v. *Pike*. (1)

The vendor cannot, under the Conveyancing and Law of Property Act, 1881, s. 3, sub-s. 6, throw the expense on the purchaser; the abstract referred to in that sub-section is not the abstract in chief: *In re Johnson and Tustin*. (2)

In *In re Ebsworth and Tidy's Contract* (3) your Lordship did refuse to compel a vendor to abstract a will which only appeared in the first abstract in a recital, but you did so simply because the purchaser had, in fact, all the information he required, and it would have been useless to have a further abstract.

John M. Gover, for the vendors. According to the definition of an abstract given by Kindersley V.-C. in *Oakden* v. *Pike* (1), I submit a proper abstract was delivered. Sub-s. 6 of s. 3 of the Conveyancing and Law of Property Act, 1881, applies to abstracts in chief; if the purchaser requires an abstract of a particular document, it must be at his own expense: *In re Ebsworth and Tidy's Contract*. (3) *In re Johnson and Tustin* (2) did not relate to a particular document. The purchaser there asked for and had a right to an abstract over a period not embraced in the abstract delivered.

NORTH J. In my opinion, the vendor has not complied with the obligation imposed on him to deliver an abstract. A very important document is left out altogether, and the documents as abstracted do not deduce any title whatever to such part of

(1) (1865) 34 L. J. (Ch.) 620. (2) (1885) 30 Ch. D. 42.
(3) 42 Ch. D. 23.

the property as was vested in Phillips; and the deed which is recited in the subsequent deed ought, beyond all question, to have been abstracted in chief, and not to have been merely left to depend upon a recital in another deed that was abstracted.

The rule with respect to the obligation to abstract deeds is, in my opinion, correctly stated in the passage in Dart on Vendors and Purchasers, 6th ed. p. 341. He says: "All documents forming part of the title should be abstracted in chief; the introduction of them merely as recitals in other abstracted instruments (which is not uncommon, especially in the case of wills) is, it is apprehended, clearly improper: were it not so, a copy of the conveyance to the vendor might, in many cases, take the place of an abstract; besides which, the omission to abstract a document in chief may proceed from a desire to avoid noticing matters of a suspicious character occurring in such document, but which are not noticed in the recital." That, I apprehend, is the well-known practice: that such documents as are material to the title and come between the stipulated commencement of the title and the title shewn in the vendor must be abstracted in chief.

Is there any authority to the contrary? I know of none. *Oakden* v. *Pike* (1) is referred to as being such an authority; but I do not think it is at all. In that case Kindersley V.-C. said: "The contention is, that the mere sending what is commonly called an abstract, which is a number of sheets of paper, purporting to set out, not verbatim, every document, but purporting to set out every document, or at least every material document, sufficiently to shew what the effect of that document is,—this is not enough; but it includes, in addition to that, if not an actual comparison of that abstract with the deeds themselves, at all events an offer by the vendor to shew those deeds whenever they are wished for. Now, I apprehend that an abstract is delivered whenever a number of sheets of paper, call it what you will, whenever a document is delivered to the purchaser, which contains, with sufficient clearness and sufficient fulness, the effect of every instrument which constitutes part of the title of the vendor, and that that is a delivery of the

(1) 34 L. J. (Ch.) 620, 622.

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abstract, even though it takes place, as it must, I apprehend, in all cases take place, before the actual comparison of the abstract with the deeds themselves, which they purport to abstract."

Now, it is said that that amounts to a statement by the learned judge that, if the abstract contains with sufficient clearness and sufficient fulness the effect of every instrument which constitutes part of the title, that is sufficient. I apprehend he was not referring to one document, the recitals of which were sufficiently abstracted to shew what was recited in that deed as the earlier title. I do not think he meant anything of the kind; and I do not think it a fair reading of those words to put that construction upon them. He says, "contains the effect of every instrument"—that is, you must have the instrument stated and its effect stated, and not merely a statement of what some other instrument contains or recites as the effect of that particular document.

Then it was said there is a decision of my own in *In re Ebsworth and Tidy's Contract* (1) to that effect. I should have been very sorry if anything could have been found in the books putting into my mouth any such expression of opinion, and I do not find it in the report. I did not at that time entertain the opinion imputed to me, and I do not now. [His Lordship having referred to the requirement by the purchaser in that case of an abstract in chief of a certain will, a recital of which only had been abstracted, and the vendor's answer to the requisition in the report (2), continued:—]

When the matter came before me, the purchaser had satisfied himself as to what the contents of the will were. There was no question about his having full knowledge then of what the will contained; but the question was whether an abstract of that should then be given. I thought it should not; that it was quite unnecessary at that stage of the matter to put the parties to the useless expense of delivering a further abstract, and I did not require them to do so. [His Lordship read his judgment on this point (3), and continued:—]

(1) 42 Ch. D. 23. (2) 42 Ch. D. 27.
(3) 42 Ch. D. 34.

Now, that decision, it seems to me, was intended to shew, and I think it does shew, that it is the duty of the parties to abstract such a document in chief, and not to leave it as a matter to be dealt with by recital, although I did not think it necessary, at that stage of the matter, when further information about the contents of the will had become unnecessary, to put the parties to the useless expense of delivering an abstract of what ought strictly to have been abstracted.

The present case is not that of a will, but of a deed; and there is no abstract of the deeds produced.

In my opinion, the deed ought to have been abstracted in chief, and the vendor was bound to do it; and, of course, when the time comes, he will have to verify the abstract in the usual way. I am not anticipating at whose expense that may have to be done.

Then, it was said that I was precluded from coming to that conclusion by the 3rd section, sub-s. 6, of the Conveyancing Act and the decision in *In re Johnson and Tustin* (1) did not apply. The distinction has been raised between that case and this, because, there what the purchaser required was, not the abstract of a particular document, but an abstract earlier than a particular date; he did not know what the documents were. In the present case the purchaser finds that the title to Phillips' title is not deduced, and has called attention to the fact that a particular deed would require to be abstracted. What he might have said was this: "The abstract is sufficient to the date of the conveyance to Pugh and Phillips, but it does not sufficiently abstract the later title, and that must be done." Instead of doing that, the purchaser mentioned a particular deed. It seems to me it makes no difference whatever that in the case of *In re Johnson and Tustin* (1) an abstract of the earlier title was called for; while in this case a particular deed which came in the later title was required to be abstracted. What the 6th sub-section deals with is this: it assumes that a perfect abstract has been delivered, and it deals with matters subsequent to that. In the present case, the objection is that a perfect abstract has not been delivered.

(1) 30 Ch. D. 42.

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In my opinion the purchaser's objection is good; and, whether the objection takes the form of saying in what respect the abstract is defective or leaves it in general terms is of no importance. I think, therefore, that *In re Johnson and Tustin* (1) is undistinguishable from the present case, and that the vendor is bound to abstract and verify, according to law, the deed in question. Of course, if he is bound to do it, he is bound to make the abstract and deliver it at his own expense.

Solicitor for purchaser: *W. Sanders Fiske.*

Solicitors for vendors: *Smith, Fawdon & Low, for Becke & Green, Northampton.*

D. P.

NORTH J.
1899
Dec. 13.

In re JOLLY.
GATHERCOLE *v.* NORFOLK.

[1899 J. 944.]

Will—Construction—Real Property Limitation Act, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1—*Rent—Set-off.*

The effect of extinguishment of an estate in land under s. 34 of the Real Property Limitation Act, 1833, is not equivalent to a conveyance.

A testatrix gave her property among her four children, and directed that all moneys owing to her at her death for rent or otherwise by any child should be brought into hotchpot in ascertaining the share of such child. One son had acquired the fee of a farm held by him of the testatrix by non-payment of rent for more than twelve years:—

Held, that twelve years' rent in respect of the period previous to the extinguishment of the estate of the testatrix was to be brought into account in fixing the amount of that son's share.

THE testatrix in this summons gave her property in trust for the benefit of her four children in equal shares, with substitutionary gifts to the children of any of them who should die in her lifetime. By her will she declared, "that all sums which I have already paid or advanced or which I shall hereafter pay or advance to or for the benefit of any child of mine, and that

(1) 30 Ch. D. 42.

all moneys owing to me at my death by any child of mine, whether for rent or otherwise, shall be taken in or towards satisfaction of the share under my will of such child or his or her child or children, and shall be brought into hotchpot and accounted for accordingly, and that no such child of mine nor the child or children of any such child of mine shall be entitled to receive any share under my will until such moneys so owing to me shall be paid to my executors."

In 1868 the testatrix let a farm in Suffolk, which belonged to her in fee, to her son R. T. Jolly at the rent of 80*l.* a year. There was no written agreement as to the holding. R. T. Jolly paid rent down to April, 1881. He remained in possession down to the death of his mother, which took place in 1899, and paid no subsequent rent and gave no acknowledgment of her title or his liability, so that his mother's title was extinguished in April, 1893. This was a summons taken out by the executors and trustees as plaintiffs, the defendants being a daughter of the testatrix and R. T. Jolly. The question raised by the summons was whether under the above hotchpot clause there ought to be deducted from the share of R. T. Jolly in his mother's estate unpaid rent for the period of twelve years between April, 1881, and April, 1893.

Henry Terrell, Q.C., and *Napier*, for the plaintiffs and for the female defendant. A debt, the power to recover which has been taken away by statute, is not destroyed: it may be set off, or may in other ways be discharged as by retainer. Even supposing there had been a conveyance to a third person, the debt for past rent would not be extinguished. An assignment of a reversion does not carry back rent: *Flight* v. *Bentley*. (1) The effect of the twelve years' occupation without payment does not effect an assignment of the landlord's estate; but the Act does not operate as a conveyance: *Tichborne* v. *Weir*. (2) The landlord's estate was extinguished by the 42nd section of the Act of William IV. We admit, therefore, that no rent can be considered due in respect of any subsequent period. But we say, on the true interpretation of the will of the testatrix,

(1) (1835) 7 Sim. 149. (2) (1892) 67 L. T. 735.

NORTH J. 1899 JOLLY, *In re.* GATHERCOLE *v.* NORFOLK.

the claimant R. T. Jolly must submit to deduction of twelve years' rent.

Vernon Smith, Q.C., and *A. M. Talbot*, for R. T. Jolly. It would be very anomalous if, when the tenant had obtained a statutory title to this land, he should still be liable in any way for rent. The rent is incident to the reversion, and cannot be said to be owing from the person who has the reversion: *Archbold* v. *Scully*. (1) The effect of holding for twelve years without payment of rent or acknowledgment is the same as if there had been a grant to the tenant at the beginning of the twelve years. After the twelve years the landlord could not have distrained: *Owen* v. *De Beauvoir*. (2) And here there was no covenant to pay rent.

NORTH J. The testatrix let a farm to her son in the year 1868, and for some thirteen years he paid rent to her. The last payment of rent was in April, 1881, and for a period from that time down to the present, extending over more than twelve years, he neither paid any rent nor gave any acknowledgment of an obligation to do so. The result was that at the end of twelve years from April, 1881, he gained a title to the land, and any right that the testatrix had to the land had come to an end. But although that is the case, and under s. 34 of the Act of William IV. the estate of the testatrix was extinguished, it is a mistake to say that the son had the same rights as if the estate had been conveyed to him. That is the exact point decided in *Tichborne* v. *Weir* (3), where a lessee lost the right to premises demised to him against a person who took possession and acquired under the statute of William IV. the right to the premises as against the lessee, who had paid rent to the landlord. At the expiration of the term, the landlord sued the person who had occupied under the covenant to repair contained in the original lease, and it was contended on behalf of the landlord that the adverse possession and the statute had the same effect as an assignment by the lessee to the defendant would have had. And it was held that

(1) (1861) 9 H. L. C. 360. (2) (1847) 16 M. & W. 547.
(3) 67 L. T. 735.

was not so, and therefore the defendant was not liable on the covenants in the lease.

Here the defendant got into possession, remained in possession for twelve years without paying rent, and then under the statute became entitled to hold to the land. If that were all, there would be nothing more to say. But the question has arisen under the will of the testatrix, who gave shares to her four children with a direction that all monies owing to her by any child, "whether for rent or otherwise," should be brought into hotchpot and deducted from the share of that child. This defendant is precisely in the position contemplated by the testatrix, and the statute which prevented the testatrix from recovering the back rents from the defendant by action did not take away her right to say that what her son had already got by non-payment of rent should not be received by him again in the division of her estate. It seems to me that there is a clear legal direction in the will which can be enforced in the division of the estate. I think, therefore, that the trustees are bound to deduct twelve years' rent of the farm from the share of R. T. Jolly. It is right that the deduction should stop at the end of twelve years; for subsequently to that time no rent could become owing.

Solicitors: *Field, Roscoe & Co., for Birkett & Ridley, Ipswich; Morris & Bristow, for Jackaman, Sons & Miller, Ipswich.*

D. P.

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Nov. 2, 4, 7; *Dec.* 6.

JOHNS *v.* PINK.

[1899 J. 1074.]

Judgment—Execution—Judgment against Lessee for Years—Writ of Elegit—Judgment Creditor Tenant by Elegit — Liability to indemnify Lessee against Payment of Rent—Practice—Sheriff—Duty to file Writ and Inquisition.

C., who was lessee of land for a term of years, mortgaged the same to the plaintiffs by way of sub-demise, less the last three days of the term, and covenanted to pay the rent and perform the covenants in the lease. The defendant, who was the owner of the demised property subject to C.'s term, recovered judgment against her in the Queen's Bench Division for two quarters' rent, and sued out a writ of elegit under which the sheriff, after inquisition, delivered the property to him. After the inquisition the plaintiffs appointed a receiver under their mortgage. The defendant recovered nothing under his judgment and took no further steps under the elegit, but afterwards distrained on the property for a further half-year's rent. In an action to restrain the distress:—

Held, (1.) that, assuming the defendant was by virtue of the elegit an assignee of C.'s term, he only took it for a limited purpose, and could not be treated (on the principle of *Moule* v. *Garrett*, (1872) L. R. 7 Ex. 101) as surety for her and bound to indemnify her against the payment of the rent; (2.) that the property was delivered to the defendant, not in respect of the mere reversion expectant on the determination of the sub-demise, but to the extent of C.'s interest as mortgagor in possession; that that interest was determined by the appointment of the receiver, and consequently the title of the defendant as tenant by elegit had either been extinguished or suspended:

Held, therefore, that the defendant was entitled to distrain.

It is the duty of the sheriff, after executing a writ of elegit, to have the writ and inquisition filed in the Central Office. It is not sufficient, though it has been common, to deliver such documents to the plaintiff's solicitor.

By eight indentures of lease dated July 30, 1897, eight houses in Wearside Road, Lewisham, were respectively demised to Mrs. Mary Louisa Cole for the term of ninety-nine years from September 29, 1896. By an indenture dated July 31, 1897, Mrs. Cole demised the said houses to the plaintiffs for the term of ninety-nine years granted by the respective leases thereof, except the last three days thereof, by way of mortgage, to secure the repayment of 1800*l.* and interest; and she thereby covenanted with the plaintiffs for the payment of the rents and

performance of the covenants reserved by and contained in the said leases. The mortgage deed also contained the usual declaration of trust of the last days of the term by the mortgagor for the mortgagees. By an indenture also dated July 31, 1897, the said houses were conveyed to the defendant in fee simple, subject to and with the benefit of the eight leases to Mrs. Cole. At Christmas, 1898, two quarters' rent were due under each of the leases from Mrs. Cole, and the defendant brought an action against her in the Queen's Bench Division for these arrears, and, on February 9, 1899, recovered judgment for 20*l.* and 5*l.* 5*s.* costs. On the same day the defendant issued a writ of elegit against Mrs. Cole under the judgment. On February 17, 1899, an inquisition was held under the writ, and by an instrument under the seals of the sheriff and the jurors it was stated that the jurors found that Mrs. Cole was possessed, as of her own lands and tenements, of the eight houses, which the jurors found to be of the annual value of 200*l.*; and that the sheriff on the day of taking the inquisition had caused these lands and tenements to be delivered to the defendant at reasonable price and extent in accordance with the writ. The writ and instrument were handed by the sheriff to the defendant's solicitors, but had not been filed in court, nor had the defendant proceeded further under the writ. At the date of the inquisition Mrs. Cole was in receipt of the rents and profits of the property; but on March 28, 1899, the plaintiffs, in exercise of the powers conferred upon them by the Conveyancing and Law of Property Act, 1881, appointed a receiver of the rents and profits, who duly entered into receipt thereof. On June 24, 1899, a further half-year's rent became due, and on June 28 the defendant levied a distress on all the eight houses for the recovery thereof. The plaintiffs then brought this action, claiming a declaration that the several terms of years created by the said eight indentures of lease were vested in the defendant as assignee of Mrs. Cole, and that the defendant as such assignee was bound to indemnify her, and consequently the plaintiffs also, against the covenants contained in the said leases; and they now moved for an injunction to restrain the defendant from distraining upon the demised

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Jenkins, Q.C., and *C. J. Edwards*, for the plaintiffs. The effect of extending the term is that it is vested in the defendant until the judgment is satisfied, when it will revert to Mrs. Cole. So long as the judgment remains unsatisfied the effect as to vesting is the same as if the sheriff had sold the term to the defendant at an appraised value. We base our claim to an injunction on two grounds. First, we say that the defendant has become by operation of law an assignee of the term, and that he is in the same position as if he were an assignee from Mrs. Cole, and is therefore liable to pay the rent reserved by the leases and to indemnify Mrs. Cole against the rent; that Mrs. Cole is by the terms of her mortgage deed bound to indemnify the plaintiffs; that consequently the defendant is bound to indemnify the plaintiffs; and that in order to avoid circuity of action the Court will allow the plaintiffs to proceed directly against the defendant: *Moule* v. *Garrett*. (1) Secondly, we say that the defendant, being an assignee of the term, cannot distrain for rent which as assignee he is liable to pay to himself as reversioner. This argument is independent of any question of merger, which we admit does not exist, having regard to the declaration of trust in favour of the plaintiffs of the last three days of the term, and to s. 25, sub-s. 4, of the Judicature Act, 1873. That the effect of the return of the writ is to vest the term in the judgment creditor until the judgment is satisfied is shewn by *Hatton* v. *Haywood* (2) and *In re Pope*. (3) The filing of the return is not necessary to the title of the creditor, but is for the protection of the debtor. The tenancy by the elegit is constituted by the return, and not by the filing, which is a mere ministerial act: *In re Pope* (3); *Casseldine* v. *Munday* (4); *Fulwood's Case* (5); *Burnett* v. *Lynch*. (6)

Upjohn, Q.C., and *R. J. Parker*, for the defendant. Assum-

(1) (1870) L. R. 5 Ex. 132; (1872) L. R. 7 Ex. 101.
(2) (1874) L. R. 9 Ch. 229, 236.
(3) (1886) 17 Q. B. D. 743.
(4) (1833) 2 Dowl. 169.
(5) (1591) 4 Rep. 64 b.
(6) (1826) 5 B. & C. 589; 29 R. R. 343.

ing that the whole term is vested in the defendant, and that there has been a complete delivery in execution, having regard to all the circumstances under which the defendant was in possession under the elegit, the law ought not to imply a covenant on the part of the defendant to indemnify Mrs. Cole. It is said that the defendant is liable to indemnify Mrs. Cole, although Mrs. Cole is his own debtor, and the defendant's possession is merely by way of security, and although he has not received a penny from the execution. There is no authority for that proposition. On the contrary, it is the universal practice of conveyancers, which has been sanctioned by the Conveyancing Act, 1881, s. 7 (*d*), to require the mortgagor to indemnify the mortgagee. That is the converse of the implied liability set up by the plaintiffs. Then it is said that because the defendant is liable to indemnify Mrs. Cole, and Mrs. Cole is liable to indemnify the plaintiffs, the defendant must indemnify the plaintiffs and may be sued directly, and *Moule* v. *Garrett* (1) is relied on in support of that proposition; but that case proceeded on the ground (1.) that there was a common obligation to the lessor on the part of the lessee and assignee, and (2.) that, inasmuch as the whole benefit of the lease was received by the assignee and not by the lessee, there was an implied promise by the assignee to indemnify the lessee in respect of the obligation. The principle of that decision is accurately stated by Willes J., and the language of Cockburn C.J. went beyond what was required. That this is the true ground of the decision appears from the judgments of the Court of Appeal in *Bonner* v. *Tottenham and Edmonton Permanent Investment Building Society* (2), where A. L. Smith L.J. criticises the observations of Cockburn C.J. Here neither of the two requirements exists, for, first, there is no common obligation, since the plaintiffs, being underlessees, are under no obligation to pay rent to the lessor, and therefore there can be no implied obligation by the assignee to the underlessees: see per Blackburn J. in *Moule* v. *Garrett* (3); and, secondly, no benefit has been received by the defendant, but all the benefit

(1) L. R. 5 Ex. 132; L. R. 7 Ex. 101. (2) [1899] 1 Q. B. 161.
(3) L. R. 7 Ex. 102.

STIRLING J. has been received by the plaintiffs themselves, since they have intercepted the receipt of the rents and profits by appointing a receiver.

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Further, we say that there has been no vesting of the term in the defendant.

The return to the writ has never been filed. The title of a creditor by elegit is a title of record, and must be tried by the production of the record, and there is no record until the return is filed: *Garraway* v. *Harrington* (1); *Fulwood's Case* (2); *Hoe's Case* (3); and see *Lloyd* v. *Davies*. (4)

[*Jenkins, Q.C.*, referred to Bacon's Abr. tit. Execution, C 2.]

The writ is returned when it is filed in court—handing to the execution creditor is not enough. *In re Pope* (5) and *Casseldine* v. *Munday* (6) are distinguishable. It is immaterial whether the title cannot exist without the record, or whether it is only triable by the production of the record. In neither case have the plaintiffs proved that which it was necessary for them to prove, and De non existentibus et non apparentibus eadem est ratio.

Apart from this point, the whole term did not vest in the defendant. The judgment debtor had two estates—namely, (1.) the equity of redemption in the sub-term, and (2.) the original term in reversion on the sub-term. As to the equity of redemption, this interest cannot be delivered under a writ of elegit: *Lyster* v. *Dolland* (7); *Doe* v. *Greenhill* (8); *Forth* v. *Duke of Norfolk*. (9) This is assumed in *Hatton* v. *Haywood* (10); *Anglo-Italian Bank* v. *Davies* (11); *Salt* v. *Cooper* (12); and even if the equity of redemption is extendible, that does not seem from the inquisition to be the interest which was purported to be extended.

As to the original term in reversion, that also was not capable of being extended, because it is a mere dry reversion without any rent or services incident to it, and it was subject

(1) (1620) Cro. Jac. 569.
(2) 4 Rep. 64 b, 67 b.
(3) (1600) 5 Rep. 90 a.
(4) (1848) 2 Ex. 103.
(5) 17 Q. B. D. 743.
(6) 2 Dowl. 169.
(7) (1792) 1 Ves. 431.
(8) (1821) 4 B. & Al. 684.
(9) (1820) 4 Madd. 503.
(10) L. R. 9 Ch. 229, 236.
(11) (1878) 9 Ch. D. 275, 282.
(12) (1880) 16 Ch. D. 544, 548.

to a declaration of trust for the mortgagees: *In re South* (1); *In re Harrison and Bottomley.* (2)

What is the interest of the judgment debtor here in the original term? A freeholder who grants a term is still seised of the land, but a termor who grants a term is not; and if the judgment debtor has no estate in possession and no benefit such as a rent connected with the reversion, he has nothing of which corporeal possession can be given; and, further, this was not the interest which was purported to be extended.

But, assuming that the original term has been extended, and that the non-filing of the return is immaterial, the original term does not vest in the judgment creditor, but only a conditional and determinable estate therein: 1 Step. Com. 11th ed. 309; *Corbet's Case* (3); Preston on Conveyancing, vol. iii. 3rd ed. pp. 169, 178, 180, 181; *Dighton* v. *Greenvil.* (4)

[*Jenkins, Q.C.*, referred to *Carter* v. *Hughes.* (5)]

That case merely decides that, where a judgment debtor has a term, the first extent exhausts all the debtor's interest which can be delivered in execution—that no extendible interest remains, because ex hypothesi the debtor never had a feudal possession, but only a possession in fact, and that possession is taken away from him. Although this estate by elegit can only last a few weeks, it is suggested that the whole of the term vests. It is clear that where a judgment debtor has a freehold the judgment creditor takes only a chattel interest, and something is left in the judgment debtor. Why should not the result be the same when the judgment debtor has a long term? For these reasons we submit that the whole of the term is not vested in the defendant.

[They also referred to *Underhill* v. *Devereux.* (6)]

Jenkins, Q.C., in reply. It is said that the sheriff's return to the writ has never been filed. But the title of the tenant by elegit depends on the writ and inquisition. The return of the sheriff to the writ is mere matter of evidence. The entry on

(1) (1874) L. R. 9 Ch. 369.
(2) [1899] 1 Ch. 465, 473.
(3) (1599) 4 Rep. 81 b, 82 a.
(4) (1690) 2 Vent. 321; see also Colles' Ca. in Par. 64 and 5 Cruise's Dig. 193.
(5) (1858) 2 H. & N. 714, 722.
(6) (1669) 2 Saund. 71 a.

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the judgment roll is complete proof of title: 2 Bacon's Abr. (1798) 711; 3 Bacon's Abr. (1832) 379; *Ramsbottom* v. *Buckhurst*. (1) If it be merely a question of evidence, we have something better here than the record—namely, an admission. The defendant produces the original return or document to which the sheriff set his seal. *Casseldine* v. *Munday* (2) shews that the term of the tenant by elegit had already arisen, although the return had not been entered on the roll. Again, it is contended that the original term in reversion was not capable of being extended, because it is a mere dry reversion. There is, however, nothing in *In re South* (3) and *In re Harrison and Bottomley* (4) to shew that the reversion must be of any value. The judgment creditor is bound by the finding of the jury. The mortgagor's reversion was of some value, and was an extendible interest: *Poole Corporation* v. *Whitt* (5); *Burden* v. *Kennedy*. (6)

I submit that the judgment creditor takes the whole term subject to the right of the judgment debtor to get it back in certain events: *Spencer's Case* (7); 2 Platt on Leases, p. 419; *Carter* v. *Hughes*. (8) The true view is that the judgment creditor takes the whole interest of the debtor.

Again, it is said that the defendant is not liable to indemnify Mrs. Cole because he is in the position of a mortgagee, and the mortgagee of a term does not indemnify the mortgagor; but an extent is not merely a charge on the land; it has all the properties and incidents of an estate in the land: 3 Preston on Conveyancing, 3rd ed. p. 179. *Moule* v. *Garrett* (9) is conclusive on this point. The defendant is the person to receive the ground-rent, and he is also the person to pay it. He has no legal title to intercept the mortgagees' rents, and they are entitled to restrain the distress.

Cur. adv. vult.

(1) (1814) 2 M. & S. 565; 15 R. R. 352.
(2) 2 Dowl. 169.
(3) L. R. 9 Ch. 369.
(4) [1899] 1 Ch. 465, 473.
(5) (1846) 15 M. & W. 571, 577.
(6) (1757) 3 Atk. 739.
(7) (1582) 5 Rep. 16 a; 1 Sm. L. C. 10th ed. 52.
(8) 2 H. & N. 714, 722.
(9) L. R. 5 Ex. 132; L. R. 7 Ex. 101.

Dec. 6. STIRLING J. (after stating the facts). The grounds on which the plaintiffs' case was rested were—(1.) that the defendant had become an assign of the term vested in Mrs. Cole, and was, as between her and himself, bound to indemnify her against the rent, while she was, by express contract contained in her mortgage deed, bound to indemnify the plaintiffs, and that the Court, to avoid circuity of action, would enforce directly against the defendant at the instance of the plaintiffs the right which Mrs. Cole herself had; (2.) that the defendant, being an assign of the term vested in Mrs. Cole, would, if the reversion expectant on the determination of the lease were vested in another, be liable to the reversioner for the rent, and being himself reversioner could not enforce by distress the payment of the rent which he was himself liable to pay as assign of the lease. As regards the first of these points, assuming that the defendant has become an assign of the term vested in Mrs. Cole, I am unable to see that under the circumstances of this case the defendant has as between himself and Mrs. Cole become liable to indemnify her against the rent. The primary relation between Mrs. Cole and himself is that of debtor and creditor, and not of assignor and assignee. A judgment creditor under such circumstances may make himself liable to the lessor for rent, and may be unable to satisfy his judgment debt without payment of that rent, and, if so, the payment would be allowed upon a proper account being taken between himself and the judgment debtor; but if he can escape without paying the rent I see no reason as between him and the judgment debtor why he should not. The case relied on for the plaintiff was *Moule* v. *Garrett* (1), where it was held that an assignee of a lease is under an obligation to indemnify the original lessee, who has parted with all his interest, against the rent and covenants. The ground of the decision is thus stated by Channell B. (2): "It is only reasonable to hold . . . . that the liability of the lessee is as a surety for the assignee, and that there is an implied promise on the part of each assignee to indemnify the lessee against liability for breaches of covenant whilst he is assignee"; and by Willes J. (3): "Where a party

(1) L. R. 5 Ex. 132; L. R. 7 Ex. 101. (2) L. R. 5 Ex. 138. (3) L. R. 7 Ex. 104.

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is liable at law by immediate privity of contract which contract also confers a benefit, and the obligation of the contract is common to him and to the defendant, but the whole benefit of the contract is taken by the defendant; the former is entitled to be indemnified by the latter in respect of the performance of the obligation." In this case the whole interest of the lessee is not taken by the judgment creditor; it is only taken by him for a limited purpose and for a limited time—namely, until he can, and in order that he may, obtain satisfaction of his debt. There is no authority for treating the judgment creditor under such circumstances as a surety for the lessee, and it does not seem to me to be reasonable.

The second point raises a much more difficult question, namely, What is the nature of the interest of a tenant by elegit in a term delivered to him in execution of the writ? Where the land delivered is of freehold tenure, it seems clear that the judgment creditor has only a chattel interest, whose duration is measured by the satisfaction of the debt: see Burton's Compendium, pl. 868, where it is stated: "Estates by statute merchant, statute staple, and elegit, are so far of the same kind with those last mentioned"—that is, the estate of executors to whom lands have been devised for payment of debts and until debts be paid, or of the grantee of a rent-charge who is empowered to enter and take the profits of lands until arrears thereof are satisfied—"as their duration is measured by the satisfaction of a debt; but as the tenancy does not commence until an extent (i.e., a valuation) of the tenements has been made by the proper authority, these estates seem to have all the certainty of continuance which is necessary to constitute a term of years. And accordingly, although the statutes to which they owe their origin, speak of the seisin of the creditor, and provide that if dispossessed he shall have his remedy by assize, yet it has been always held that such interests have the similitude only and not the nature of freehold": see Co. Litt. 43 b. The judgment debtor therefore has remaining in him an interest which, in the case of *Dighton* v. *Greenvil* (1), was held to be a reversion. It

(1) 2 Vent. 321.

was contended for the defendant that this doctrine ought to apply equally to the respective interests of the judgment creditor and debtor when the land delivered is of leasehold tenure. The answer given on behalf of the plaintiffs was that there are authorities which shew that this is not the case. In *Spencer's Case* (1) the law is thus laid down: "If a man demises or grants land to a woman for years, and the lessor covenants with the lessee to repair the houses during the term, the woman marries and dies, the husband shall have an action of covenant as well on the covenant in law on these words (demise or grant) as on the express covenant. The same law is of tenant by statute merchant or statute staple or elegit of a term." That implies that the tenant by elegit has the whole term vested in him: see 2 Platt on Leases, p. 419. Again, in *Carter* v. *Hughes* (2) Martin B. said: "In this case the execution debtor had only a term in the land, and upon the transfer of that the whole is spent, and what remains in him is not a reversion but a right to the possession of the term after satisfaction of the first writ." Remembering that upon an alienation of a term by will or deed successive interests take effect, not by way of particular estate and remainder, but by way of executory interest (see *Manning's Case* (3); *Lampet's Case* (4); *Wright* v. *Cartwright* (5)), I think it may well be that the whole term is taken by a judgment creditor, but subject to a legal title in the nature of an executory interest in the judgment debtor which, like other such interests, cannot be defeated by the act of the first taker. This would explain, on the one hand, the authorities cited, and, on the other, why (as is admitted to be the law) the term does not merge in a reversion vested in the judgment creditor. Assuming this to be so, I have to consider, after all, what was delivered to the defendant. By the statute 1 & 2 Vict. c. 110, s. 11, the sheriff is authorized to deliver execution of lands of which the judgment debtor "is seised or possessed." For example, an estate in remainder or reversion expectant on an estate of freehold cannot be delivered in execution: *In re*

(1) 5 Rep. 16 a, 17 a.
(2) 2 H. & N. 723.
(3) (1609) 8 Rep. 94 b.
(4) (1612) 10 Rep. 46 b.
(5) (1757) 1 Burr. 282.

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South (1) and *In re Harrison and Bottomley*. (2) Under the law as it stood prior to the passing of the Act 1 & 2 Vict. c. 110, a moiety only of the lands of the judgment debtor could be extended; and it was held that if two writs were issued at the suit of different creditors, and a moiety of the freehold land of the debtor was extended under the first writ, the sheriff could not deliver a moiety of the entirety under the second writ, but only a moiety of the remaining moiety: *Huyt* v. *Cogan*. (3) It thus appears that what was called in *Dighton* v. *Greenvil* (4) the reversion of the judgment debtor in the first moiety could not be delivered. Since 1 & 2 Vict. c. 110, it has been held in *Carter* v. *Hughes* (5) that where a judgment creditor issued three writs of elegit on successive judgments, and the sheriff delivered to him possession of land under the first writ, he had no power to extend the same land under the second and third writs. In the present case the inquisition found that Mrs. Cole was "possessed" of certain land of the annual value of 200*l*. In point of fact she was so possessed; for though she had made a mortgage of the lands by way of sub-demise, the mortgagees had not taken possession at the date of the inquisition, and she was in receipt of the rents and profits, and was in that way entitled to the land for an interest which was valuable so long as it lasted, but which might be determined at any moment by the mortgagees. It appears to me that the land must be taken to have been delivered to the defendant to the extent of that interest, and not in respect of the mere dry reversion expectant on the determination of the sub-demise, as to which the doctrine of *In re South* (1) seems to apply. The mortgagees have since entered into possession; the determinable interest has been put an end to, and the right of the defendant as tenant by elegit has either been extinguished or is suspended. In either case, it seems to me that any liability on the part of the defendant to pay the rent reserved by the original lease has come to an end, and, consequently, he is entitled to distrain. The motion, therefore, fails, and the action must be dismissed with costs.

(1) L. R. 9 Ch. 369.
(2) [1899] 1 Ch. 465.
(3) (1596) Cro. Eliz. 482.
(4) 2 Vent. 321.
(5) 2 H. & N. 714.

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Having taken that view on the merits of the case, it is unnecessary for me to enter upon the consideration of a question which has been much argued—namely, whether or not the interest of the judgment debtor vested in the defendant until the inquisition had been filed in court. But having regard to what has happened, I think it right, having made some inquiries, to say a few words about it. The writ is expressly directed to the sheriff in these words: "And in what manner you shall have executed this our writ make appear to us in our Court aforesaid immediately after the execution thereof under your seal and the seals of those by whose oath you shall make the said extent and appraisement, and have there then this writ." The proper and regular practice is that the sheriff should return the writ and have the inquisition and writ filed in the Central Office, and the only way in which the possession of the writ and inquisition by the solicitor to the defendant can be explained is, so far as I can see, that he received it as agent for the sheriff with a view to filing. That practice has, I understand, recently become prevalent; and the explanation of it appears to be that upon the filing of the writ and inquisition a charge or stamp duty of 2*s.* 6*d.* becomes payable, which, as the law stands, is thrown upon the sheriff. With a view of escaping from that obligation, and in the hope that the plaintiff will see his way to discharge the duty to the Exchequer, it has become a common practice of the sheriff to hand over the writ to the plaintiff. It is very essential that the document which I have before me should be filed in court; and if the solicitors to the defendant are willing to undertake to discharge the duty of the sheriff and file it, I have nothing more to say. But, if not, I think it must remain in the custody of the Court, and I propose to call upon the sheriff to explain why the document is not either in his possession or on the file of the Court.

[The defendant's solicitors gave the required undertaking.]

Solicitors: *W. Brookes Palmer; Arkcoll, Cockell & Co.*

G. A. S.

STIRLING J.

1900

Jan. 12.

PAYNE *v.* THE CORK COMPANY, LIMITED.

[1899 P. 2810.]

Company—Articles of Association—Reconstruction—Voluntary Winding-up—Sale of Assets to New Company—Shares in purchasing Company—Rights of Dissentient Members—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.

A company cannot, by its articles of association, deprive members of the protection afforded to them by s. 161 of the Companies Act, 1862, in the event of their dissenting from a sale of the company's assets in a winding-up in consideration of shares in a new company.

A company by its articles gave the liquidator, in the case of a voluntary winding-up, power (irrespective of the powers conferred upon him by the Companies Acts, and as an additional power), with the authority of a special resolution, to sell the undertaking and assets of the company for shares fully or partly paid up, or the obligations of or other interest in any other company, and to make an agreement for the allotment to the shareholders direct of the proceeds of sale in proportion to their respective interests in the company. The articles further provided that upon any sale thereunder, or under s. 161 of the Companies Act, 1862, no member should be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same, or to purchase his interest in the company; but that the liquidator might, upon the request in writing of a dissentient member, sell his shares or interest and pay over to him the net proceeds thereof:—

Held, that the articles were ultra vires and inoperative so far as they purported to deprive dissentient shareholders of the rights conferred upon them by s. 161.

MOTION.

On November 20, 1899, an extraordinary general meeting of the defendant company was held at which the following special resolutions were passed:—

"(1.) That it is desirable to reconstruct the company, and accordingly that the company be wound up voluntarily, and that Mr. Thomas Rees, of 12, Aldgate, E., be and he is hereby appointed liquidator for the purposes of such winding-up.

"(2.) That the said liquidator be and he is hereby authorized to consent to the registration of a new company to be called the Cork Company, Limited, with a memorandum and articles of association in the form of a draft signed for the purpose of identification by the chairman of this meeting.

"(3.) That the draft agreement signed for the purpose of identification by the chairman of this meeting be and the same is hereby approved, and that the liquidator be and he is hereby authorized, pursuant to s. 161 of the Companies Act, 1862, and to art. 130 of the company's articles of association, to enter into an agreement with the proposed new company (when incorporated) in the terms of the said draft, with such modifications as he may from time to time deem expedient, and to carry the same into effect."

Arts. 130 and 131, which formed two of a group of clauses under the heading "Winding-up," and related to sales in a winding-up, were, so far as material, in the following terms. Art. 130: "Any such liquidator"—that was to say, the liquidator in any winding-up, whether voluntary, under supervision, or compulsory—"may (irrespective of the powers conferred upon him by the Companies Acts, and as an additional power), with the authority of a special resolution, sell the undertaking of the company, or the whole or any part of its assets, for shares fully or partly paid up, or the obligations of or other interest in any other company." Art. 131 provided that, "Upon any sale under the last preceding article or under the powers given by s. 161 of the Companies Act, 1862, no member shall be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same, or to purchase such member's interest in this company; but in case any member shall be unwilling to accept the shares, obligations or interest to which under such sale he would be entitled, he may within fourteen days of the passing of the resolutions authorizing the sale by notice in writing to the liquidator require him to sell such shares, obligations or interest, and thereupon the same shall be sold in such manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale."

The draft agreement referred to in the third resolution provided (inter alia) that the old company should sell and the new company should purchase the whole property, assets, and undertaking of the old company; that as part consideration for the said sale the new company should undertake and discharge

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all the debts, liabilities, and obligations of the old company and the costs of the winding-up, and keep indemnified the old company and its liquidator against all actions, claims, and demands in respect thereof; that the residue of the consideration should be a certain specified sum, to be satisfied by the allotment to the liquidator or his nominees of certain specified shares in the new company credited as partly paid; that every member of the old company should be entitled to require the liquidator to procure the allotment to him of shares forming part of the consideration in certain specified proportions; and that if it should be necessary for the liquidator in order to carry the sale into effect to purchase the interest of any member of the old company, then and in every such case the money received by the liquidator for any shares sold to which such member would have been entitled had he applied for the same should, less costs, be applied in or towards payment of such sum, as by arbitration between the old company and such member or by agreement made with the sanction of the new company between such member and the liquidator, should be determined to be the price payable in respect of such purchase, and in so far as the net proceeds of such sale should be less than the sum so determined the new company should pay the amount of such deficiency to the liquidator.

On December 5, 1899, the above-mentioned resolutions were confirmed. The liquidator then proceeded to enter into and carry into effect the agreement mentioned in the third resolution.

The plaintiff was the holder of 200 shares in the defendant company. He opposed the passing of the resolutions, and did not vote in favour of them at either of the meetings; and on December 9 he wrote to the liquidator expressing his dissent from the resolutions, and requiring the liquidator either to abstain from carrying them into effect, or to purchase the interest held by him at a price to be determined in manner specified in s. 161 of the Companies Act, 1862. On December 15, 1899, the solicitors of the liquidator replied as follows:—

"The liquidator has been advised that the provisions of arts. 130 and 131 of the company's articles of association,

copies of which are annexed, preclude members from acquiring the rights given to dissentient members by s. 161 of the Companies Act, 1862.

"Under these circumstances, we presume you would wish the liquidator to assume that your letter of dissent is a notice under art. 131 that you require him to sell the shares in the new company to which you would be entitled under the scheme of reconstruction, and that the net proceeds thereof should in due course be paid over to you."

The plaintiff thereupon brought this action against the company and its liquidator, Mr. Thomas Rees, and now moved for an injunction to restrain the liquidator from carrying the special resolutions and agreement into effect, and from parting with the assets and undertaking of the old company to the new company without making proper provision for the payment to the defendant of what might be found coming to him under the provisions of ss. 161 and 162 of the Act.

The question was whether the articles of association were effectual to deprive the plaintiff of the benefits to which as a dissentient shareholder he was entitled under s. 161.

R. Whitehead, for the plaintiff. The effect of art. 131 is to deprive the plaintiff, in the events which have happened, of the rights to which, as a dissentient member, he is entitled under s. 161 of the Companies Act, 1862. To that extent it is invalid, and the plaintiff is not bound by it.

It is well established that there are certain rights conferred by the Companies Acts upon shareholders which cannot be taken away from them by the articles of association: *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1); *In re Peveril Gold Mines, Limited.* (2)

W. F. Hamilton, for the liquidator. Clauses similar to those now in question are constantly found in articles of association, and they are perfectly valid.

In *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1) the articles were very different; there was no express power of sale except under s. 161.

(1) [1899] 2 Ch. 80, 90. (2) [1893] 1 Ch. 122.

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[STIRLING J. Has any company power to insert such provisions in its articles?]

Under s. 16 of the Act of 1862 every member is bound by the articles of association unless, of course, they contain anything inconsistent with or against public policy or contrary to the provisions of any statute.

[STIRLING J. Where the Legislature has conferred on the liquidator of a company power to do certain things on particular conditions, there is a negative implication that they shall not be done in any other way. What right, then, has a company to insert into its articles a stipulation that the liquidator may do those things in another way?]

The articles in question merely confer an additional power on the liquidator.

[STIRLING J. The object of the articles appears to be to free the liquidator from the restrictions imposed by the Act. The articles confer a power to sell for shares upon terms other than those imposed by the Act.]

In *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1) the decision was that the article in that case could not be regarded as an agreement under s. 162. The Court held that articles of association only constituted a contract between the members inter se, and that as s. 162 contemplated an agreement between the liquidator and a member, the articles could not be an agreement within s. 162.

In *In re Peveril Gold Mines, Limited* (2), Chitty L.J. said (3): "We have not now to consider whether an individual shareholder can or cannot bind himself not to petition for the winding-up of the company, nor generally how far the provisions of the Act may be modified by the articles of association." So that there is no authority against my contention.

[STIRLING J. referred to s. 133 (4) of the Companies Act, 1862.]

(1) [1899] 2 Ch. 80, 90.
(2) [1898] 1 Ch. 122.
(3) [1898] 1 Ch. 131.
(4) Sect. 133 provides that in a voluntary winding-up "the property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their rights and interests in the company."

This is a company which provides "otherwise" by its regulations as to the mode of distribution of its property. Having regard to the decision of Chitty J. in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1) and to clause 3 (F) of the memorandum of association (2), if the company before going into liquidation had entered into a contract substantially the same as the contract entered into by the liquidator in this case, the liquidator would have been bound to carry it into effect.

Does your Lordship think that with regard to a winding-up there are certain statutory provisions which can neither be varied nor added to by any article of association?

[STIRLING J. When the Legislature has prescribed the mode in which a particular power is to be exercised, I confess I do not see how it is competent for the company by its articles of association to provide that it shall be exercised in any other way.]

The interests of the dissentient shareholders are sufficiently protected by the agreement, and no injunction, it is submitted, ought to be granted; but the liquidator is willing to give an undertaking similar to that given in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate.* (3)

STIRLING J. (after stating the facts). The question which I have to decide is whether these articles of association 130 and 131 preclude the plaintiff from insisting on his rights under s. 161. Under s. 133 of the Act of 1862 certain consequences follow from a voluntary winding-up of the company. It is provided that "the property of the company shall be applied in satisfaction of its liabilities pari passu, and, subject thereto, shall, unless it be otherwise provided by the regulations of the company, be distributed amongst the members according to their

(1) [1892] 3 Ch. 454.

(2) The memorandum of association provided as follows:—

"3. The objects for which the company is established are: . . . .

"(F) To sell, let, develop, dispose of, or otherwise deal with the undertaking or all or any part of the property of the company, upon any terms, with power to accept as the consideration any shares, stocks, or obligations of any other company."

(3) [1899] 2 Ch. 80, 90.

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rights and interests in the company." Then liquidators are to be appointed for the purpose of winding up the affairs of the company and distributing its property. Then "upon the appointment of liquidators all the powers of the directors shall cease, except in so far as the company in general meeting or the liquidators may sanction the continuance of such powers." Then "the liquidators may, without the sanction of the Court, exercise all powers by this Act given to the official liquidator": and amongst those is a power (s. 95) "to sell the real and personal and heritable and movable property, effects, and things in action of the company by public auction or private contract, with power to transfer the whole thereof to any person or company, or to sell the same in parcels." Now, a power to sell means, in the absence of any context, a power to sell for money, and a person who exercises such a power is bound to sell for money. But the Legislature has seen fit to extend the powers of voluntary liquidators by s. 161. [His Lordship read the first part of that section, and continued:—] I pause there to observe that the agreement, which was sanctioned by the resolution and which has been agreed to be carried out, is a sale which falls within the terms of that portion of s. 161. It is a sale in which the liquidator is receiving as compensation, or part compensation, certain shares in the new company. But the power which is conferred by that section is not absolute. It is subject to this proviso. [His Lordship read it, and continued:—] The object of this section is very clearly explained by Chitty L.J., sitting as a judge of first instance, in *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1), where he says: "The 161st section is in substance this—when there is a winding-up, whether voluntarily or by the Court or under supervision, the duty of the liquidators under the Act of Parliament is to turn all the assets of the company into money, and, having paid the creditors and the costs of the winding-up, then to distribute among the members according to their equities the surplus, if there be any. Then it was seen that there were many cases in which a company might wind itself up voluntarily or the like merely for the purpose of reconstruction,

(1) [1892] 3 Ch. 454, 460.

and that it would be very advantageous that there should be taken a power in substance for the company to reconstruct itself. That was one of the objects that was sought to be accomplished by the 161st section; but the gist of the enactment is this—that the liquidators in a winding-up, instead of selling for money, may sell for shares; but, as a safeguard against that, and against imposing possibly a liability upon a member of the company which is being wound up by seeking to force upon him shares which were not fully paid up, the Legislature has, by way of protecting his interest, said in substance that if he dissents he may receive the value of his shares in money. That is, in short, an explanation of the meaning and effect of the 161st section. It relates to what may be done where there is a winding-up." In the present case we have a sale in a winding-up to which s. 161 relates. [His Lordship then referred to art. 131, and said:—] Supposing, then, that this sale were carried out exclusively under s. 161, would art. 131 bind the plaintiff so as to deprive him of his rights under s. 161? It seems to me that it would not, and that the article would be ultra vires for that purpose. The Legislature has conferred on voluntary liquidators a power of selling in a particular way, and it has attached to that power provisions which constitute a safeguard for the protection of dissentient shareholders, and in my opinion it is not competent for the company by articles framed in this way to deprive the shareholders of that protection. It seems to me that the language of Byrne J. in the case of *In re Peveril Gold Mines, Limited* (1), with reference to a right conferred by another section, applies. He said this (2): "I am of opinion that the company had no right, having regard to the Act of Parliament, to enter into such contract as a condition and part of the general contract binding upon all shareholders, whatever separate or distinct bargain they might have the power to make with an individual who happened to be or to desire to become a shareholder. This article appears to be one more attempt to remove a statutory safeguard of the inexperienced intending shareholder. Not one per cent. of intending shareholders read the articles before applying for or

(1) [1898] 1 Ch. 122. (2) [1898] 1 Ch. 126.

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accepting a transfer of shares, and a shareholder does not expect to find that he has entered into a special contract waiving his statutory rights."

That seems to me to be applicable to the present case. But then it is said that this is a sale which the company had power to authorize, and did authorize by its articles of association irrespective of s. 161, and doubtless art. 130 does purport to confer on the liquidator a power of doing this very thing irrespective of the powers conferred on him by the Companies Act and by way of additional power. Then the question comes to this: Has the company power by its articles of association to confer such an additional power upon the liquidator? The Legislature has said that the liquidator shall sell for money, but it has conferred on a voluntary liquidator a power of selling for shares subject to certain safeguards. The first part of this art. 130 purports to confer, by way of addition, on the liquidator the power of sale for shares, and by art. 131 it purports to confer the power of doing so without regard to the safeguards imposed by s. 161. Now, it seems to me that when the Legislature has conferred on a liquidator a power to do a particular thing subject to certain safeguards being observed, it is not within the power of the company to say that the liquidator shall do the very same thing without regard to those safeguards. I take it that the meaning of the Legislature in imposing those safeguards is this—that the thing may be done, but if it is done, it must be done in the way in which it has been pointed out and in no other. The case is in that respect somewhat similar to the statutory power of borrowing. If a company is authorized to borrow up to a certain amount, that means that it may not borrow beyond that amount, and it is well established that any attempt by the company to do so is ultra vires: see *Chambers* v. *Manchester and Milford Ry. Co.* (1) So here, the liquidator is authorized to do a particular thing in a particular way and on particular terms, and it seems to me it is beyond the powers of the company to authorize him to do the same thing upon other terms and in another way than those prescribed by the Legislature. Art. 131 does not stop

(1) (1864) 5 B. & S. 588.

at the point to which I have read. It goes on: "But in case any member shall be unwilling to accept the shares, obligations or interest to which under such sale he would be entitled, he may within fourteen days of the passing of the resolutions authorizing the sale, by notice in writing to the liquidator, require him to sell such share, obligations or interest, and thereupon the same shall be sold in such manner as the liquidator may think fit, and the net proceeds shall be paid over to the member requiring such sale." Now, supposing that the earlier part of that art. 131 were omitted—and practically for this purpose it must be omitted as being in my opinion ultra vires—this portion of the clause cannot be relied upon against the plaintiff. In that respect it falls precisely within the recent decision of the Court of Appeal in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate*. (1) I desire to refer to a portion of the judgment of the Master of the Rolls as being in support of the view which I have already expressed with reference to the early part of art. 131. The point decided in *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (1) was this—that a stipulation contained in the articles of association with reference to the mode in which the shareholders were to be paid did not constitute an agreement within s. 162. The Master of the Rolls says this (2): "I come to the conclusion that there was no agreement between the company on the one side and Mr. Baring-Gould on the other, which could deprive him of his rights as a dissentient member under s. 162. Any contrary interpretation of that section would come to this, that the company could by the articles of association made beforehand—before there was any dispute with a dissentient member—bind all the members, and deprive them of the benefits conferred on them in the event of their becoming dissentient members under s. 162. I do not think this can be done by the articles of association. This is my view of the joint effect of ss. 16, 161, and 162." The Master of the Rolls there appears to be of opinion, as I read his judgment, that it is impossible by articles of association to deprive the dissentient members of the benefits conferred on them by s. 161.

(1) [1899] 2 Ch. 80. (2) [1899] 2 Ch. 90.

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Then, as to the case to which I have already referred of *Cotton* v. *Imperial and Foreign Agency and Investment Corporation* (1), the sale there made was not a sale in a winding-up, and that was the ground of the decision. It was a sale by a going company under the power conferred on it by the memorandum of association, and, as the Lord Justice pointed out, the validity of that sale could not be impeached by the liquidator, but the question would be when he received the shares which were the consideration for the sale what he was to do with them. That does not apply to the present case, because this is a sale in a winding-up. In my judgment, therefore, the plaintiff is entitled to the relief which he asks, and, unless the liquidator is willing to give an undertaking, there ought to be an injunction which it seems to me may be very well in the form of the undertaking given by the liquidator in the case of *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate* (2), which is stated at p. 82 of the report, namely, not to part with the assets of the defendant company without setting apart a sufficient sum to answer what may be found due to the plaintiff.

Solicitors for plaintiff: *Fraser & Christian.*

Solicitors for defendants: *Ashurst, Morris, Crisp & Co.*

(1) [1892] 3 Ch. 454.

(2) [1899] 2 Ch. 80.

G. A. S.

In re THOMAS. WEATHERALL *v.* THOMAS.

[1899 T. 520.]

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1899
Dec. 14, 19.
1900
Jan. 17.

Tenant for Life and Remainderman—Capital or Income—Leasehold Houses—Outgoings—Drainage Expenses—Improvements—Capital Money—Conflict between Settlement and Act—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *ss.* 25, 51, 56—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13, 15.

The cost of reconstructing the drainage of leasehold houses, forming part of a residuary estate bequeathed to trustees upon trust for tenant for life and remaindermen :—

Held, to be payable out of capital money, as an improvement within the meaning of the Settled Land Acts, notwithstanding a direction in the will that pending a sale the rents, after payment of "all incidental expenses and outgoings," were to be paid to the tenant for life.

ADJOURNED SUMMONS.

This was an application by the trustees of the will of the late Alfred Thomas, which raised the question whether the cost of reconstructing the drainage of three leasehold houses, Nos. 18 and 20, Porchester Terrace, and Berkeley Lodge, Sydenham Hill, forming part of the testator's residuary estate, was to fall upon income or capital, the question being further complicated by the fact that the terms of the will and the provisions of the Settled Land Acts were in conflict on this point.

The testator, who died in June, 1893, devised and bequeathed his residuary estate to trustees upon trust for sale, conversion, and investment in the usual way, and directed them to stand possessed thereof, as to one moiety, to pay the income thereof to his wife for her life, and after her death to stand possessed of such moiety upon the same trusts as were declared of the other moiety, and, as to the other moiety, to pay the income thereof to his daughter for her life, to her husband for his life if he survived her, and, after the death of the survivor, upon trust for the daughter's children in the usual way. The will contained the following power to postpone a sale and power of

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management: "And I also declare that my trustees or trustee may postpone the sale and conversion of my real and personal estate or any part thereof notwithstanding that such property may be of a leasehold or wasting tenure so long as they shall think fit, and that the rents profits and income to accrue from and after my decease of and from such part of my real and personal estate as shall for the time being remain unsold and unconverted shall, after payment thereout of all incidental expenses and outgoings, be paid and applied to the person or persons and in the manner to whom and in which the income of the moneys produced by such sale and conversion would be payable or applicable under this my will if such sale and conversion had been actually made. And I declare that my trustees or trustee may from time to time let any hereditaments for the time being remaining unsold either from year to year or for any term of years at such rent and subject to such covenants as they or he shall think fit, and may accept surrenders of leases and tenancies fell timber and other trees standing on the said hereditaments whether for sole repairs or otherwise and generally may manage the same in such manner as they or he shall think fit, and the proceeds of any timber sold by my trustees shall be considered as income and paid and applied accordingly, but this provision shall be deemed to be in addition to, and not by way of limitation of, or an expression contrary to, the provisions of the Conveyancing and Law of Property Act, 1881, and the Settled Land Acts, 1882 and 1884."

The investment clause contained power to invest (inter alia) in or upon the purchase of freehold ground-rents in England, bearing a proportion to the rack-rent at the time of purchase of not more than one-tenth, and being let for a term of not less than sixty years unexpired at the time of purchase.

Nos. 18 and 20, Porchester Terrace were old houses, and were stated to be unlettable without a large expenditure, the drainage having been practically condemned by the sanitary authority: 344*l.* had been spent on No. 18, which was held for the residue of a term of years expiring in 1923, in an entire reconstruction of the drainage and on the internal arrangements

and repairs necessary to suit modern requirements, and the house had now been let on a repairing lease at a rent of 215*l.* per annum. The trustees suggested that 186*l.* should be paid out of capital, as representing the cost of reconstructing the drainage, leaving the rest to be borne by the tenant for life as representing the cost of repairs of a current or ordinary nature. A sum of 30*l.* had been contributed towards reconstructing the drainage of No. 20, Porchester Terrace, which was held for the residue of a term of years expiring in 1921, and this sum the trustees suggested ought to be paid out of capital. This house had now been let on a repairing lease at 185*l.* per annum. A sum of 50*l.* and a surveyor's fee of 3*l.* 3*s.* had been expended on Berkeley Lodge, Sydenham Hill, which had about fifty-eight years unexpired, in reconstructing a large portion of the drainage system of this house, and this sum also the trustees suggested ought to come out of capital.

It was admitted that all the above sums had effected permanent improvements of the properties. The trustees now applied by originating summons for the determination of the question whether the sums so applied by them, including surveyor's fees, ought to be paid out of capital or income.

W. H. Cozens-Hardy, for the trustees, stated the facts to the Court.

Percy Wheeler, for the testator's widow and daughter, the tenants for life. These sums of 186*l.*, 30*l.*, and 50*l.* ought not to be paid out of income. The expenditure for these drainage works was properly incurred in the first instance by the trustees, but as between tenant for life and remainderman the cost must fall on capital: *In re Barney* (1); *In re Lever.* (2) There is no obligation on the tenant for life to put the premises in a state of repair sufficient to comply with the terms of the lease: *In re Courtier.* (3) The drainage work done amounts to an "improvement" which ought to be paid for out of "capital money": *In re Houghton Estate* (4); the fact that the work has been executed without first having a scheme submitted makes no difference.

(1) [1894] 3 Ch. 562.
(2) [1897] 1 Ch. 32.
(3) (1886) 34 Ch. D. 136.
(4) (1885) 30 Ch. D. 102.

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[BYRNE J. referred to *In re Tucker's Settled Estates.* (1)]

These houses could not have been let unless this work had been done: the tenant for life is not liable for repairs necessary at the commencement of his interest: *In re Betty.* (2)

The direction in the will to pay the income "after payment of all incidental expenses and outgoings" to the tenant for life may be disregarded as conflicting with the right conferred on the tenant for life by the Settled Land Acts: *Clarke* v. *Thornton* (3); *In re Lord Stamford's Settled Estates.* (4)

Begg, for the daughter's children. The proceeds of sale of a mixed residuary estate like this is not capital money within the meaning of the Settled Land Acts; but if the money in the hands of the trustees is capital money, then the cost of repairs of this character ought not to be allowed out of capital. There is no covenant to keep the drainage up to the latest modern requirements; everything usually paid for by an occupier ought to be paid by the tenant for life: *In re Tucker's Settled Estates.* (1) Drainage works of this kind are as much for the benefit of the tenant for life as the remainderman, and are not the kind of "improvements" contemplated by the Settled Land Act. These leasehold houses are only a part of the residuary estate. On this ground alone the case differs from those cases where "improvements" have been allowed for a mansion-house or large landed estate. The Settled Land Acts were not intended to apply to cases of this kind. The words in the will "all incidental expenses and outgoings" are wide enough to cover the cost of all these works: *In re Crawley.* (5) The testator has purposely placed on the tenant for life the onus of making good all defects. The cost of these drainage works must, therefore, be paid out of income.

Wheeler, in reply. The Settled Land Act, 1882, ss. 51 and 56, prevent a testator from throwing on the tenant for life expenses which might otherwise be paid out of capital money. By the terms of the investment clause proceeds of sale are moneys liable to be laid out in the purchase of land, &c.

Cur. adv. vult.

(1) [1895] 2 Ch. 468.
(2) [1899] 1 Ch. 821.
(3) (1887) 35 Ch. D. 307.
(4) (1889) 43 Ch. D. 84, 95.
(5) (1885) 28 Ch. D. 431.

1899. Dec. 19. BYRNE J. The question in the present case is how as between capital and income certain work executed on leasehold premises, Nos. 18 and 20, Porchester Terrace and Berkeley Lodge, Sydenham, ought to be borne.

Work has been done and properly done and paid for by the trustees, and it is agreed that a certain proportion of the cost of this work, being clearly attributable to expenditure for ordinary repair, ought to be borne by income; but on behalf of the tenants for life it is argued that the cost of reconstruction of drainage at these houses ought to be paid for out of capital moneys, or to be otherwise borne by capital.

The houses in question form part of the residuary estate of Alfred Thomas, and are held in trust for sale with power to postpone sale and deal with the property in these terms: [His Lordship having read the clause as set out above, and having referred to the investment clause, continued:—]

To clear the way, I will at once state that I am of opinion that moneys in the hands of the trustees available for investment under this will are capital moneys within the meaning of the Settled Land Acts, as being moneys liable to be laid out in the purchase of land to be made subject to the settlement.

The expenditure has been made by the trustees, not by the tenants for life, and, having regard to the special provisions for management, has been properly made, quite independently of the provisions of the Settled Land Acts.

The power of management and the provision for payment of rents, profits, and income to the tenants for life after payment thereout of all incidental expenses and outgoings would, I think, apart from the provisions of the Settled Land Acts, throw the cost of the drainage reconstruction upon the tenants for life; but this will not of itself prevent the application of capital moneys in payment for authorized improvements under the Settled Land Acts. But, assuming that the work in question comes within the description of improvements authorized by the Acts, there are two powers under which they might have been executed, one the power exercisable by the trustees under the will, and the other the power exercisable by the tenants for life under the Settled Land Acts; and in

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these circumstances, had an application been made to the Court prior to the expenditure, it would have been ordered to be made out of capital, the power of the tenants for life being paramount: see *Clarke* v. *Thornton* (1) and *In re Lord Stamford's Settled Estates.* (2)

Where, however, the money has been expended by a tenant for life without first submitting a scheme for approval as required by the Act of 1882, the Court has a discretion to authorize capital money to be applied in recouping the tenant for life under s. 15 of the Settled Land Act, 1890, and in exercising this discretion the Court should endeavour to ascertain, as between the tenant for life and remainderman, what is fair, having regard to the nature of the work done; and in every case the question must depend on the circumstances: see *In re Tucker's Settled Estates.* (3) It is pointed out also in that case that the expenses in respect of matters which are incidental to the ordinary use and enjoyment of the property ought not to be thrown on the remainderman. I do not think that I ought to apply any different principle in determining the rights as between tenants for life and remainderman because the money has been expended by the trustees and not by the tenant for life.

The case of *In re Barney* (4) differs from the present, as there the property was freehold, and the testator had provided that the parties beneficially entitled to the rents and profits of any of his houses should see that the same should be kept, or that they should keep the same, in good and absolute repair and properly insured from fire, and not, as in *Clarke* v. *Thornton* (1), giving a power to the trustees to expend money in improvements, nor, as in this case, in effect providing that all the incidental expenses and outgoings occasioned by retaining the leaseholds unconverted should be deducted from rents and income before the amount payable to the tenants for life could be ascertained.

In *In re Lever* (5) the property was leasehold, but the case

(1) 35 Ch. D. 307.
(2) 43 Ch. D. 84, 95, 96.
(3) [1895] 2 Ch. 468.
(4) [1894] 3 Ch. 562.
(5) [1897] 1 Ch. 32.

was not complicated by a clause as to incidental expenses and outgoings as in the present case, and the money was paid under stress of actual proceedings under Acts of Parliament, though in both the last-mentioned cases the application was made, as in the present case, after the expenditure had been incurred. The structural drainage works done in the present case were works which certainly in part could, and probably would, have been enforced by public authority. I think, moreover, that they were improvements within the meaning of the Settled Land Acts.

Upon the whole case I have come to the conclusion that the matter is one of discretion, and that in exercising that discretion I have to bear in mind the several considerations suggested by the cases I have referred to, as well as the fact that the necessity for the structural alterations of the drains was not in any way due to neglect since the death of the testator, but either to original defective construction, or to neglect on the part of the testator himself, as in *In re Courtier* (1), and other recent authorities bearing on the respective liabilities of a testator's estate and of the beneficiaries thereunder in reference to leasehold property bequeathed.

Considering all these matters and the permanent nature of the work done, as well as the length of the terms yet to run and the other circumstances of the case, I think I shall be right in the present case if I hold that the amount in question should be borne by capital.

[His Lordship gave the parties leave to mention the matter again if on looking through the schedule of repairs and alterations any further items should be discovered which might properly be called "improvements" within the meaning of the Settled Land Act. The summons was again heard on January 17, 1900, but nothing calling for any further notice in this report was decided.]

Solicitors: *Duffield & Bruty.*

(1) 34 Ch. D. 136.

W. C. D.

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Jan. 12, 13, 16, 20.

In re COPLAND'S SETTLEMENT. JOHNS *v.* CARDEN.

[1898 C. 2895.]

Tenant for Life and Remainderman—Capital or Income—Equitable Tenant for Life—Leasehold Houses—Repairs—Ground-rent—Cost of Sanitary Works—Public Health (London) Act, 1891 (54 & 55 *Vict. c.* 76)—*Dangerous Structures Notice—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*).

There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack-rent, and where it is sub-let at an improved ground-rent; as between tenant for life and remainderman the cost of complying with a sanitary notice under the Public Health (London) Act, 1891, and a dangerous structures notice under the London Building Act, 1894, is chargeable against income.

ADJOURNED SUMMONS.

The question for decision in this case was, whether the cost of repairs of leasehold houses, forming part of a trust estate, which had been executed by the trustees pursuant to notices from the sanitary and local authorities, was to fall upon capital or income; but the only point argued and decided which calls for any detailed report was, whether the fact that the leaseholds were sub-let at an improved ground-rent prevented the application of the ordinary rule as to the liability of a tenant for life for repairs of this kind.

The facts, so far as material, were as follows:—By a deed of January 18, 1860, certain leasehold houses were (inter alia) assigned to trustees for the residue of a then unexpired term of years, upon trust from and after the solemnization of a marriage, then intended, of the tenants for life with the consent in writing of the tenants for life during their joint lives, and of the survivor of them during his or her life, and after the decease of the survivor, at the discretion of the trustees, absolutely to sell as therein provided; and upon trust to stand possessed of and interested in the moneys to arise from such sale, and of the clear yearly rents and produce of the said leasehold premises in the meantime and until such sale, upon and for the trusts,

intents, and purposes, and under and subject to the powers, provisoes, and declarations expressed and declared of and concerning the same moneys, rents, and profits in and by the indenture of settlement of even date therewith.

By the indenture of settlement of even date, it was declared and agreed that, until the said leasehold premises should be sold and disposed of in pursuance of the trusts of the last-mentioned indenture, the trustees or trustee were to pay and apply the annual rents and profits thereof to the persons or person and in the manner, to whom, and in which the interest or annual produce of the money to arise from the sale thereof and the investments thereof would for the time being be payable and applicable under the trusts or powers therein declared or contained, in case such sale had actually then been made.

The leasehold premises comprised in this settlement had not been sold, and the tenant for life was still in receipt of the rents. The leases under which the premises are held were granted for a term of ninety-seven years expiring in 1924. At the date of the settlement in 1860 there was a subsisting underlease at an improved ground-rent. The underlessee was under a covenant which would have rendered him liable to pay for complying with the notices in question, but, as he was impecunious, nothing could be recovered from him; and on November 29, 1897, he surrendered his lease to the trustees, since which time the property had been let on weekly tenancies, and the tenant for life had received the rack-rents.

The premises were in a very bad state of repair, and in July, 1898, the trustees, as the "owners," were served with a dangerous structures notice from the London County Council under the London Building Act, 1894, requiring them to take down and repair the bulged, cracked, and defective portions of the premises, and any parts that might be found dangerous, at a cost of 87*l.*; and they were also served by the Lambeth Vestry with another notice, under the Metropolis Local Management Acts, Public Health (London) Act, and Housing of the Working Classes Act, requiring them to make good certain sanitary defects at a cost estimated at 93*l.*, the houses being described

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therein as totally unfit for human habitation, the drains being defective and the houses in a dirty, damp, and dilapidated condition. The trustees executed and paid for all the repairs required by these notices, and the question now to be determined was whether the cost was to fall upon capital or income. It was admitted that the covenants in the underlease would have enabled the trustees to recover this expenditure from the underlessee, had he been in a position to pay, which he was not, and also that the trustees were liable for these repairs under the terms of the original lease.

Felix Cassel, for the trustees, stated the facts to the Court.

Levett, Q.C., and *MacSwinney*, for the tenant for life. We admit that the tenant for life would be liable for these repairs if she had been in receipt of a rack-rent, but the fact that she has only received a small improved ground-rent prevents the application of the ordinary rule. In *In re Lever* (1) the cost of sanitary work was allowed out of capital; and so in *In re Thomas*. (2) The costs of the substantial repairs which benefit both the tenant for life as well as the remaindermen should be allowed out of capital.

Rowden, Q.C., and *Dibdin*, for the remaindermen. An equitable tenant for life of leaseholds is bound to bear the costs of complying with the covenants in the lease: *In re Betty* (3); there can be no "clear yearly rent" until the obligations under the lease have been fulfilled: *In re Redding*. (4) The equitable tenant for life must pay all that is necessary to prevent the lease from being forfeited: *In re Fowler* (5); *In re Gjers*. (6) The fact that the tenant for life receives a small rent instead of a rack-rent can make no difference.

Levett, Q.C., in reply. None of the cases cited deal with the case of a tenant for life in receipt of a small improved ground-rent. It is not the rent that is lost, it is the right to indemnity.

Cur. adv. vult.

(1) [1897] 1 Ch. 32.
(2) Ante, p. 319.
(3) [1899] 1 Ch. 821.
(4) [1897] 1 Ch. 876.
(5) (1881) 16 Ch. D. 723.
(6) [1899] 2 Ch. 54.

Jan. 20. BYRNE J. This is an application by the trustees of a settlement of January, 1860, to have it determined how, as between tenant for life and remaindermen, the expenses of complying with a dangerous structures notice served by the London County Council and of a notice served by the public health department of the Lambeth Vestry, relating to certain leasehold premises forming part of the property subject to the settlement, ought to be borne. [Having stated the settlement and referred to the facts, his Lordship continued:—]

The notices requiring the works to be done were given in July, 1898. It is common ground that the trustees acted rightly and properly in complying with these notices, and that there are onerous covenants in the superior lease held by the trustees of the settlement imposing the burden of any sums that might thus become payable under the Acts authorizing the notices on the lessee, and it is conceded on behalf of the equitable tenant for life that her interest would be liable to bear the amount as between herself and the remaindermen except, as it is suggested, for the fact that she was not entitled to the clear rack-rent of the property, but only to a small improved ground-rent. This, it is argued, ought to prevent the application of the ordinary rule.

No authority was cited for making a distinction between the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack-rent and where it is sub-let at an improved ground-rent.

I am unable to see my way to drawing a distinction on that ground. The position appears to be this. The trustees were liable under the superior lease to pay the amounts in question; they were entitled to recover from the underlessee by virtue of his covenant these amounts; he being unable to pay, the trustees are entitled to indemnity out of the whole of their trust estate. As between their cestuis que trust this is a liability which the interest of the equitable tenant for life would have had to bear but for the existence of the underlease. The existence of the underlease entitled her to the benefit of the covenants contained in it. She has lost this benefit by reason of the impecuniosity of the tenant, but she is not

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thereby relieved from the burden arising by virtue of her position. I do not see on what principle she can be relieved from her responsibility to the extent of her interest because the rent receivable under the sub-lease was small instead of large. I consider that as between tenant for life and remaindermen the amount in question is chargeable against income.

Solicitors: *Tatham & Lousada; Hemsley & Co.; Bridges, Sawtell & Co.*

W. C. D.

COZENS-HARDY J.

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Dec. 12, 13, 20.

In re FICKUS. FARINA *v.* FICKUS.

[1898 F. 1963.]

Husband and Wife—Marriage Contract—Promise by Wife's Father to leave her "a Share" of his Estate—Specific Performance.

In 1873 a father, prior to the marriage of his daughter, in a letter to her intended husband stated: "You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, and the marriage took place. The father afterwards acquired a large fortune, and died in 1898. His wife predeceased him. By his will he left a legacy of 2000*l.* to the daughter, and gave the residue of his estate equally between six of his other seven children. The daughter and her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate:—

Held, first, that the letter did not constitute a contract by the father, but was merely an expression of his intentions; secondly, that if it were a contract, it was an obligation to leave, not an equal eighth share, but some portion or share of his estate to the daughter, and was fulfilled by the legacy.

EARLY in September, 1873, Mr. Farina, a Prussian subject resident at Cologne, made proposals of marriage to Miss Eliza Fickus, an English subject, which she accepted subject to the approval of her father, Mr. William Fickus. Mr. Farina thereupon wrote to Mr. William Fickus asking for his approval to the proposed marriage, and received in reply the following letter:—

"The Avenue,
"Sydenham Park, Kent.
"21st September, 1873.

"Dear Mr. Farina,—I was much surprised at the contents of your letter expressing a wish to make my daughter Eliza your wife, and have delayed answering it until I had seen her.

* * * * * *

"You are of course aware that with my large family Eliza will have little fortune.

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"She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow.

"I hear your business is an excellent one, and that you have considerable property independent of your business. I should wish you to make such a settlement for Eliza as will befit your position and in case of death leave her provided for. All this I will leave until I see you, feeling assured you will agree with me that if possible the contingencies of life should be guarded against.

"I mention these matters not in any mercenary spirit, but believing you will wish to do what is right and just, and that we should have everything explained in an open and candid manner.

* * * * * *

"I remain,

"Yours very truly,

"W. Fickus."

Mr. Farina accepted this letter as giving him some rights. A further correspondence ensued between him and Mr. W. Fickus, junior, representing Mr. W. Fickus, senior, Mr. Farina being desirous that some immediate provision should be made for his intended wife by her father; but this Mr. W. Fickus, senior, declined to do, and the matter was not pressed.

On February 10, 1874, Mr. Farina and his intended wife executed in London a marriage contract in Prussian form, by which Mr. Farina made certain provisions for her. This contract, which did not refer to the letter of September 21, 1873, contained the following clauses (1):—

"Between the future married couple there shall not be any community of goods, but to every one shall belong his and her present and future fortune, with the right for the husband to have the administration of the same and to receive the revenue thereof.

"The bride is not yet in possession of any fortune by the

(1) [This is stated to be an official translation. The reporter is not answerable for its English.—F. P.]

reason her parents being still alive. The amount of every augmentation of her fortune shall be noted exactly in an inventory.

"The wife is secured in respect of her fortune by the general mortgage on the fortune of her husband, according to the Articles of Law No. 2121 and No. 2122 in the Code Napoleon."

Mr. W. Fickus, senior, was a party to this contract, but merely for the purpose of testifying his full consent to the intended marriage. The next day the marriage took place.

Mr. W. Fickus, senior, died in February, 1898, having since 1874 acquired a fortune exceeding 100,000*l.* His wife had predeceased him. By his will he gave his daughter, Mrs. Farina, a legacy of 2000*l.*, and, after making various other bequests and legacies, he gave the residue of his estate equally between six of his other seven children.

In December, 1898, this action was commenced by Mr. and Mrs. Farina against the executors of the will, claiming a declaration that the letter of September 21, 1873, constituted a binding contract for valuable consideration by the testator to give or leave to the plaintiff, Eliza Farina, in the events which had happened, one equal eighth share of the whole of his property after payment of his debts and funeral and testamentary expenses; and consequential relief on that footing.

Warmington, Q.C., and *P. S. Stokes*, for the plaintiffs. The father intended the recipient of the letter to understand that, subject to providing for his widow, his daughter should have an equal share in his estate with his other children. Mr. Farina made his marriage contract on the faith of the letter, and the plaintiffs are entitled to enforce the representation or promise that the letter contains: *Luders* v. *Anstey* (1); *Hammersley* v. *De Biel* (2); *Coverdale* v. *Eastwood* (3); *Synge* v. *Synge*. (4) The case of *Laver* v. *Fielder* (5) shews the meaning to be attached to the word "share." Here it is clear from the context that by this letter the testator intended his

(1) (1799) 4 Ves. 501; 4 R. R. 276.
(2) (1845) 12 Cl. & F. 45, 62, n.
(3) (1872) L. R. 15 Eq. 121.
(4) [1894] 1 Q. B. 466.
(5) (1862) 32 Beav. 1.

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daughter to share equally with his other children. The words "with my large family" point to his other children. "To share" means "to participate"—that means equal division amongst the members of the family: *Robertson* v. *Fraser*. (1)

Astbury, Q.C., and *Method*, for the defendants. The old doctrine of making good a representation is exploded. The letter either amounts to an offer resulting in a contract, or it is nothing: *Hammersley* v. *De Biel* (2); *Jorden* v. *Money* (3); *Maddison* v. *Alderson*. (4)

It is submitted that the letter is not a contract, but merely the expression of the testator's intentions in the future, and cannot be enforced: Fry on Specific Performance, 3rd ed. s. 316; *Moorhouse* v. *Colvin*. (5) But if it is a contract, the words "a share" do not mean an equal share with the other children, but only some portion or share, and the testator has fulfilled the engagement by the legacy of 2000*l*. Further, the Prussian contract does not refer to the letter, and this rebuts any presumption that the testator intended to bind himself: *Loxley* v. *Heath*. (6)

Warmington, Q.C., in reply, cited *Salusbury* v. *Denton* (7) and *Brown* v. *Higgs*. (8)

Cur. adv. vult.

Dec. 20. COZENS-HARDY J., after stating the facts above detailed, continued:—Questions of this nature have often come before the Courts, and although it is not reasonable to construe the letter of September 21, 1873, by reference to the construction put upon somewhat similar documents in other cases, it is important to have regard to certain principles which have been laid down as applicable to cases of this nature. A mere representation that the writer intends to do something in the future is not, though the person to whom it is made relies upon it, sufficient to entitle that person to obtain specific performance or damages. There must be a contract in order to

(1) (1871) L. R. 6 Ch. 696.
(2) 12 Cl. & F. 45, 62, n.
(3) (1854) 5 H. L. C. 185.
(4) (1883) 8 App. Cas. 467.
(5) (1851) 15 Beav. 341.
(6) (1860) 1 D. F. & J. 489.
(7) (1857) 3 K. & J. 529.
(8) (1803) 8 Ves. 561; 4 R. R. 323, 337.

entitle the party to obtain any relief. This seems to me to result from the judgments of the House of Lords in *Hammersley* v. *De Biel* (1), *Jorden* v. *Money* (2), and *Maddison* v. *Alderson*. (3) In the next place, I think that if the letter amounted to an offer by the testator which would become a contract if and when accepted by Mr. Farina, I must presume that it was accepted, and that the marriage took place on the faith of this offer: see *Luders* v. *Anstey*. (4) I do not think that the mere fact that a settlement was executed by the husband, but not by the lady's father, the writer of the letter, suffices to rebut this inference. Moreover, I have seen Mr. Farina in the box, and I feel no doubt that he jealously kept the testator's letter, and relied upon it as giving him some rights. It remains, however, to consider whether there was a contract, and, if so, whether there was a breach. The material words in the letter are these: "You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The plaintiffs' contention is that the true meaning and effect of the letter is this: "If you, Mr. Farina, will make a settlement on my daughter before her marriage, I will give my assent, and —subject only to the rights of my widow, as to which I reserve myself a free hand—I will bind myself to leave her by my will an equal share with all my other surviving children in my property, subject only to debts and testamentary expenses." Upon consideration, I cannot bring myself to believe that this is the true effect of the letter. It is not, as in *Hammersley* v. *De Biel* (5), an "arrangement proposed" by the father, and stated by him to be "sufficient for" the husband "to act upon." It is not, as in *Laver* v. *Fielder* (6), a statement that the writer would "adhere to" a "proposition" previously made. I regard it as in no sense a proposal or offer, but rather as a representation that the testator was not in a position to make any proposal or to give his daughter anything at the

(1) 12 Cl. & F. 45.
(2) 5 H. L. C. 185.
(3) 8 App. Cas. 473.
(4) 4 Ves. 501; 4 R. R. 276.
(5) 12 Cl. & F. 45, 62, n.
(6) 32 Beav. 1.

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time, but that he intended to give her something at his death. I do not regard it as an offer resulting in a contract by the testator. If, however, I am wrong in this view, it remains to consider whether there has been a breach. It has been argued that the words "my large family" mean "my children," and that the words "a share" mean "an equal share with my other surviving children." If, for instance, at the testator's death there had been living only Mrs. Farina and one other child of the testator, but there had been grandchildren, the issue of the six deceased children, it would follow that Mrs. Farina would be entitled to a sum equal to half the testator's estate, and the other descendants could only get the remaining half between them. I cannot think that this was in the contemplation of any of the parties. The words are not "her share," as in *Laver* v. *Fielder* (1), which were held to mean the share to which the daughter would be entitled in the event of intestacy. I think "a share" means "some share," or "some part." The testator has given Mrs. Farina 2000*l.*, and has satisfied the obligation, if any, imposed by the letter. The result is that, in my opinion, the plaintiffs are wrong, and the action must be dismissed with costs.

Solicitors for plaintiffs: *Parker, Garrett & Holman.*
Solicitors for defendants: *Emmet & Co.*

(1) 32 Beav. 1.

H. L. F.

WEST *v.* DIPROSE.

[1899 W. 895.]

Bill of Sale—Sale—Interest.

COZENS-HARDY J.

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Jan. 16.

Principal and interest secured by bill of sale were payable by equal monthly instalments. The borrower authorized the lender to sell, and out of the proceeds deduct the amount for which she was "liable":—

Held, that on sale interest ceased to run, and the lender was entitled to retain unpaid principal and interest to date only.

In September, 1898, the plaintiff, Miss West, held a lease of her residence, 17, Ovington Gardens, and owned furniture on the premises of considerable value. She borrowed a sum of 500*l.* of the defendant, a money-lender. She assigned to him her lease and executed a bill of sale to him of her furniture to secure repayment of principal and interest at the rate of 60 per cent. per annum by equal monthly instalments of 50*l.*

The bill of sale was dated September 17, 1898, the date of the loan. The operative part was as follows: "This indenture witnesseth that in consideration of the sum of 500*l.* now paid to the mortgagor by the mortgagee (the receipt of which the said mortgagor hereby acknowledges) the mortgagor doth hereby assign unto the mortgagee all and singular the several chattels and things specifically described in the schedule hereto annexed and now in and about the premises known as 17, Ovington Gardens, Brompton Road, South Kensington, in the county of Middlesex, by way of security for the payment of the said sum of 500*l.* and interest thereon at the rate of 60*l.* per cent. per annum. And the mortgagor doth further agree and declare that she will duly pay to the mortgagee the principal sum aforesaid, together with the interest then due, by monthly instalments of 50*l.* each, commencing on the 17th day of October now next. Provided always that the chattels hereby assigned shall not be liable to seizure or to be taken possession of by the said mortgagee for any cause other than those specified in s. 7 of the Bills of Sale Act, 1878, Amendment Act, 1882."

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One monthly instalment of 50*l.* was duly paid. Before the next instalment was due an arrangement was made for the sale by the defendant of the mortgaged premises and the repayment of the loan out of the proceeds. The plaintiff wrote a letter dated November 1, 1898, to the defendant in the following terms: "I hereby authorize and request you to dispose of the lease, fixtures, furniture, and effects at 17, Ovington Gardens, South Kensington, either by auction or privately as you may think best, and for the best price you can obtain for same, and out of the net proceeds to deduct the amount for which I am liable to you under the bill of sale given by me, and in consideration of your trouble in the matter I agree to pay you one-third the amount of any balance there may be due to me upon such sale as aforesaid."

In January, 1899, the defendant sold the lease and most of the furniture for 750*l.*

This action was originally brought to impeach the bona fides of the sale, for an account, and redemption. The charge of mala fides had been withdrawn. The action was brought to trial on the question how much the defendant was entitled to retain. He maintained that he was entitled to be paid the whole amount he would have been paid if the subject of the security had not been sold—that is to say, the full amount of the monthly instalments. The plaintiff, on the other hand, asserted that he was entitled only to interest up to the date of the sale being carried out, and the unpaid principal.

Ingpen, for the plaintiff. It would be contrary to the principles of equity and justice on which the Court acts in dealing with the relations between mortgagee and mortgagor to allow the mortgagee, when by his own act he has got into his pocket the principal money, to get further interest: *Weardale Coal and Iron Co.* v. *Hodson* (1); *Haslewood* v. *Consolidated Co.* (2) It is not like the case where the mortgagor is compelling the mortgagee to receive his money.

Cababé, for the defendant. The rule is that, if the mortgagor seeks to pay off, the mortgagee cannot be compelled to take less

(1) [1894] 1 Q. B. 598, 601. (2) (1890) 60 L. J. (Q.B.) 12.

than he would get if the mortgage ran on for the stipulated time. But if the mortgagee himself takes steps to realize, interest ceases to run from the time he sells, and this rule applies where there is a sale under Order LVII., r. 12; for then the sale is made against the mortgagor in invitum: *Ex parte Ellis* (1); *Forster* v. *Clowser*. (2) In this case the sale was made at the request of and for the purpose of the mortgagor: she authorized the mortgagee to retain what she was "liable" for; she was "liable" for all the future instalments. The case stands on the same footing as if the mortgagee came here to redeem.

Ingpen, in reply.

COZENS-HARDY J. This action raises an important question in relation to bills of sale made in a form which has been before the Court on more than one occasion. If nothing else had happened, the mortgagor could not have compelled the mortgagee to receive repayment otherwise than by the instalments provided for by the deed. On the other hand, if the mortgagee took steps to realize his security, if he sold or brought foreclosure proceedings, then the Court would have held him only entitled to payment off of principal and interest down to the date of his receiving payment. And in such cases the Court has held that the strict terms of the instrument are not to be complied with, because to hold otherwise would shock all sense of justice.

That principle has been applied not only to cases where the mortgagee has taken the initiative in realizing his security, but also to a case where goods subject to a bill of sale were taken in execution and sold by the sheriff under Order LVII., r. 12. In directing the proceeds of such sale to be applied "in such manner and upon such terms as may be just," the Court of Appeal held that the bill of sale holder was entitled to interest only up to the time of payment.

The principle to be derived from these cases seems to be this. Though the mortgagee cannot be compelled to take payment of interest for less than the stipulated time, yet if he himself

(1) [1898] 2 Q. B. 79. (2) [1897] 2 Q. B. 362.

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puts an end to the security by realization, or if by reason of the intervention of a third party under the interpleader rule, the mortgagor's property is realized, from the moment the principal money gets into the pocket of the lender interest ought to stop. In this case the sale was made by the authority of the mortgagor, contained in a letter by which she authorized the defendant to retain a third of the balance for his trouble. She directed him to deduct the amount for which she was liable under the bill of sale. The defendant elected to do that which he was in no way bound to do, to proceed under that authority. In my view, I ought to apply exactly the same principle to a sale under that authority as I should apply in case of a sale by the mortgagee under a power, or in distributing the proceeds of sale by a sheriff under the interpleader rule. In other words, I do not think there is anything to prevent me doing that which seems plainly just. I hold that from the moment the money was received interest ceased to run. I intend to follow the rule laid down in *Forster* v. *Clowser*. (1)

Solicitors for plaintiff: *Apps & Son.*
Solicitor for defendant: *John Westcott.*

(1) [1897] 2 Q. B. 362.

D. P.

HEXTER *v.* PEARCE.

[1898 H. 3267.]

FARWELL J.

1899

Dec. 13, 14.

Mineral Property—Agreement for Lease of Undivided Moiety—Specific Performance.

The Court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property.

Price v. *Griffith*, (1851) 1 D. M. & G. 80, discussed and explained.

THIS was an action by the plaintiffs for the specific performance of an agreement for the grant of a lease of the clay and other minerals in or upon an undivided moiety of and in certain freehold lands, with liberty to work, dig, and sell the same.

The facts, so far as material for the purposes of this report, were as follows:—

The defendant Parmenas William Pearce was the owner in fee of an undivided moiety of certain fields forming part of the Teignbridge estate, in the county of Devon, subject to an annuity charged thereon in favour of his wife, the defendant Mary Elizabeth Pearce.

By an indenture dated April 30, 1894, the defendant P. W. Pearce and the co-owners of the other undivided moiety of the said fields granted to the defendant William Henry Whiteway Wilkinson (trading as Whiteway & Co.) a licence for the term of five years from September 29, 1893, to mine, dig, raise, and remove in and from the said fields (including, inter alia, the fields comprised in the agreement next hereinafter mentioned) merchantable potter's clay in the manner and quantities and at the rent and royalties therein specified.

By an agreement dated May 11, 1896, and made between the defendants P. W. Pearce and Mary E. Pearce of the one part, and the plaintiffs William Hexter and William Humpherson of the other part, after reciting the title of the defendant P. W. Pearce to a moiety of all or some of the fields above referred to and specifying them by name, and that the defendant Mary E. Pearce had certain interests or rights therein, and that the right to dig and sell clay or other minerals

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in the said lands was then vested in Whiteway & Co. under the licence or lease above mentioned, it was thereby agreed "that upon the expiration of the said lease to Whiteway & Co. on or about September 29, 1898, or at such other time as it shall legally expire, the said P. W. Pearce shall grant unto the said W. Hexter and W. Humpherson a full and proper lease to work, dig, and sell the clay or other minerals in and upon the said moiety of the lands to which the said P. W. Pearce has a just and legal right, such lease to be upon the same terms and with the same covenants, so far as they may be properly applicable, as are now contained in the lease hereinbefore mentioned, at present held by Whiteway & Co.; and the said Mary E. Pearce hereby agrees to execute any document that may be required to enable the said lease to be granted to the said W. Hexter and W. Humpherson as above described; and the said W. Hexter and W. Humpherson hereby agree to accept the lease as before described for the term of seven, fourteen, or twenty-one years, at their option, on the aforesaid terms and conditions."

By an indenture dated March 23, 1898, the defendant P. W. Pearce and the then co-owners of the other undivided moiety of the lands comprised in the lease or licence of April 30, 1894, above mentioned, granted a lease or licence to the defendant W. H. Whiteway Wilkinson to mine, dig, raise, and remove in and from the entirety of such lands merchantable potter's clay for a term of five years from September 29, 1898, subject to the rent, royalties, and covenants therein contained, and upon terms and conditions as to quantity and otherwise closely corresponding to those contained in the licence of April 30, 1894. This second licence was granted by the defendant P. W. Pearce without the consent of the plaintiffs, and the defendant W. H. W. Wilkinson knew of the existence of some agreement between the plaintiffs and his co-defendants relating to minerals under the said lands, but he was not aware of its contents.

Subsequently the plaintiffs insisted on their right to have the contract of May 11, 1896, specifically performed, and, in consequence of the refusal of the defendants P. W. Pearce and

Mary E. Pearce to grant any lease in pursuance of the contract, the present action was commenced.

The plaintiffs claimed, first, specific performance of the agreement of May 11, 1896; secondly, a declaration that any fresh lease of the clay and minerals granted to the defendant W. H. W. Wilkinson by his co-defendants was void as against the plaintiffs, and delivery up for cancellation of any such lease; and, thirdly, an account of the clay and minerals raised by the defendant W. H. W. Wilkinson since September 29, 1898, and payment of one moiety of the value thereof.

The evidence shewed that it was practicable to work the clay which was left by two independent persons at different places within the area.

Warmington, Q.C., and *Badcock, Q.C.*, for the plaintiffs. There is no authority exactly in point, but we submit that, unless the difficulties in working these mines under the lease which we ask for are insuperable, this contract ought to be specifically enforced. The evidence does not shew that the working of this mine by the plaintiffs and the lessees of the other undivided moiety is impracticable.

[FARWELL J. referred to *Porter* v. *Lopes* (1), where Sir George Jessel M.R. appointed a receiver in a partition action on the ground of inconvenience.]

The defence of inconvenience by itself is not enough. In *Burrow* v. *Scammell* (2), which is to some extent an authority in favour of our contention, specific performance as to a moiety was enforced against the defendant, who had contracted to sell the whole of a house, and who, as was subsequently discovered, was only a tenant in common of an undivided moiety of it. There can be no more inconvenience in the present case than in that. It is quite practicable for these tenants in common to work the mine together, and it must be assumed that they or their lessees will act reasonably in the event of this agreement being specifically enforced.

[They also referred to Seton on Judgments, 5th ed. vol. i. p. 659, and to Fry on Specific Performance, 3rd ed. p. 566.]

(1) (1877) 7 Ch. D. 358. (2) (1881) 19 Ch. D. 175.

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Vernon Smith, Q.C., and *Ward Coldridge*, for the defendants Pearce. The plaintiffs are not entitled to specific performance for two reasons: first because this agreement is too uncertain, and next because it relates to an undivided moiety of a mine. We rely upon the opinion expressed by Knight Bruce L.J. in *Price* v. *Griffith* (1), where he seems to doubt whether an agreement to grant a lease of an undivided moiety of a mine will be specifically enforced. That case, we submit, cannot be reconciled with *Burrow* v. *Scammell*. (2) Possibly, if this were a contract for the sale of the moiety, specific performance might be decreed, but a lease does not confer the same right to deal with the minerals as a conveyance in fee would, and we say that it would not be practicable or possible for the plaintiffs to work the minerals contemporaneously with the present lessee.

The proper remedy in this case is, we submit, damages, and not specific performance. The grant of a lease to the plaintiffs would probably give rise to further litigation.

T. L. Wilkinson, for the defendant Wilkinson. It will not be practicable for two independent lessees to work these minerals at the same time. I submit that my client's lease is a good lease, although I admit that, if the plaintiffs get specific performance of this contract, my client may have to pay a proportionate share of the royalties to them on the principle of *Job* v. *Potton*. (3)

Warmington, Q.C., in reply.

FARWELL J., after deciding that the agreement of May 11, 1896, was not too uncertain to be enforced, continued as follows:—Then it was said that there ought not to be a judgment for specific performance, but only for damages. As regards that point, I felt some difficulty at first, but I have been convinced by the argument I have heard that I ought to grant specific performance in this action. I have now had the advantage, since the matter was discussed in opening, of hearing the evidence in the case, and I have seen the witnesses;

(1) 1 D. M. & G. 80. (2) 19 Ch. D. 175.
(3) (1875) L. R. 20 Eq. 84.

and it is sufficient for me to say that I find as a fact that there is a substantial amount left of the merchantable clay, and that it is practicable to work the clay which is so left, as in fact it has been worked in times past by two independent persons at different places within the area. That being so, there is nothing special in the circumstances, and the case raises the point neatly whether specific performance ought ever to be granted in the case of a contract relating to an undivided moiety of mineral property, and I am asked to lay down a general rule that the Court cannot grant specific performance of such a contract. No authority has been cited to me for the existence of such a rule, unless I could read the dictum—because I do not think it comes to more than that—of Knight Bruce L.J. in *Price* v. *Griffith* (1) as sufficient. That case was really decided on another ground, as Bacon V.-C. pointed out in *Burrow* v. *Scammell* (2), namely, that the agreement was void for uncertainty. But the Lord Justice does say this (3): "If he intended to contract at all, he intended to contract for a lease of the whole colliery. Cases may be conceived where a person, who has contracted to convey more than it is in his power to convey, ought to be decreed to convey what he can, either with or without compensation to the vendee for such part of the subject-matter of the contract as the vendor is unable to convey. But a lease of an undivided moiety of a colliery is a very different thing from a lease of a whole colliery." In a sense, with great deference to the Lord Justice, that is a truism; but the meaning, I think, is that in that case the intention of the lessor was to grant a lease of the entirety and nothing else. There would have been a certain hardship in compelling him to grant a lease of a moiety only when he did not intend it, having regard to the fact that it was a lease of mineral property. I think that is all the Lord Justice meant. This case is different in the material point that here there is a clear intention to grant a lease of the moiety. As far as authority goes, the case of *Burrow* v. *Scammell* (2) is to some extent an authority, if authority were

(1) 1 D. M. & G. 80. (2) 19 Ch. D. 175.
(3) 1 D. M. & G. 84.

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needed, for holding that the Court will grant specific performance of a contract relating to an undivided moiety of mineral property. To my mind the whole doctrine of specific performance rests on the ground that a man is entitled in equity to have in specie the specific article for which he has contracted, and is not bound to take damages instead. The right to sue on a contract is the same in law and in equity, but the remedies differ, and a court of equity will grant the equitable remedy in all cases, so far as I have been able to discover, unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it.

I think the case Knight Bruce L.J. had in his mind would fall within the second category. I am not aware that the Court has ever taken into consideration the comparative convenience or inconvenience of the plaintiffs and defendants apart from the considerations I have just mentioned. Whether the contract is a convenient or an inconvenient one is for the parties to consider when they enter into it. As regards a purchaser from a tenant in common, whether the purchase is of the fee or only of a lease, I cannot myself see that the purchaser need have any greater difficulty in working the minerals than the tenant in common himself would have had. I cannot assume that the defendant Wilkinson will act unreasonably. If he acts reasonably, then on the evidence before me I find that there is no difficulty in working. If I assumed that he was going to act unreasonably, I should not allow that to constitute a foundation for a defence which he would not otherwise possess.

Therefore I think this is a case in which I ought to grant specific performance.

Solicitors: *Crowders, Vizard & Oldham, for Windeatt & Windeatt, Totnes; Mann & Crimp, for T. & J. Hutchings, Teignmouth.*

G. M.

In re JOSEPH HARGREAVES, LIMITED.

[00408 of 1898.]

C. A. 1899 WRIGHT J. *Dec.* 14. C. A. 1900 *Jan.* 24.

Company—Winding-up—Discovery—Production of Documents—Discretion of Judge—Officer of Government Department—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

Under s. 115 of the Companies Act, 1862, the judge has a discretion as to making an order for the production of documents, and the Court of Appeal will not readily interfere with the exercise of his discretion, though it has jurisdiction to do so in a proper case.

The liquidator of a company, in order to obtain evidence in support of a misfeasance summons which he had issued against the directors of the company and the auditors, applied under s. 115 for an order that the surveyor of taxes should attend for examination and produce some balance-sheets of the company which had been delivered to him for the purpose of assessment of income tax. The surveyor objected to produce these documents, and the Board of Inland Revenue supported his objection by a resolution that their production would be "prejudicial and injurious to the public interests and service":—

Held, by Wright J., that an order for production ought not to be made under s. 115:

Held, by the Court of Appeal, that the exercise by the judge of his discretion ought not to be interfered with.

Per Romer L.J.: The question for decision was not necessarily the same as that which might arise on the hearing of the misfeasance summons with regard to a subpœna for the production of the documents in question.

Per Wright J.: It is not in every case essential that the principal officer of a Government department should himself attend in court to take such an objection to the production of documents in the possession of the department. In many cases the Court will be satisfied of the validity of the objection by other evidence—e.g., by the affidavit of a responsible officer.

THIS company was incorporated by registration under the Companies Act, 1862, on June 13, 1894.

On August 30, 1897, the company resolved to wind up voluntarily and appointed a liquidator.

On December 13, 1898, the liquidator issued a summons claiming the payment by the directors and the auditors of the company of three sums, amounting to 2602*l.* 16*s.* 8*d.*, together with interest thereon, on the ground that in the three years

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1894, 1895, and 1896 the directors had paid dividends out of the capital of the company upon profit and loss accounts and balance-sheets approved by the auditors.

In order to prove as against the auditors the case alleged by this summons the liquidator on November 21, 1899, issued another summons under s. 115 of the Companies Act, 1862, calling on G. F. Howe, the surveyor of taxes for the Bradford first district, to attend to be examined on the part of the liquidator for the purpose of the proceedings under the misfeasance summons.

The summons required the surveyor to bring with him and produce the three balance-sheets of the company for the years 1894, 1895, and 1896, which were in his possession. These balance-sheets had been delivered by the auditors of the company to the surveyor for the purpose of the assessment of income tax.

The surveyor attended before the registrar at the time and place mentioned in the summons, but he declined to produce the balance-sheets, on the ground that to do so would be a violation of the oath which he had taken, as required by ss. 38 and 189 of the Income Tax Act of 1842, and that the production would be contrary to public policy. The matter was adjourned to be heard by the judge.

On the hearing by Wright J. an affidavit was made by the secretary to the Commissioners of Inland Revenue, stating that the following resolution had been passed by the Commissioners, sitting as a Board: "In the opinion of the Board of Inland Revenue, who have duly considered the question, the production of the documents referred to in the summons . . . . would be prejudicial and injurious to the public interests and service." (1)

(1) By s. 115 of the Companies Act, 1862, "The Court may, after it has made an order for winding up the company, summon before it . . . . any person whom the Court may deem capable of giving information concerning the trade, dealings, estate, or effects of the company; and the Court may require any such . . . . person to produce any books, papers, deeds, writings, or other documents in his custody or power relating to the company. . . ."

This section is by s. 138 made applicable to a voluntary winding-up.

The application was heard before Byrne J. on December 14, 1899.

P. F. Wheeler, for the liquidator. The application is made under s. 115 of the Companies Act, 1862, but an objection is taken, in support of which the respondent only produces a verified certificate of what is said to be a resolution of the Board of Inland Revenue.

Danckwerts, for the respondent. A resolution having been passed by the Board that the production of the balance-sheets would be injurious to the public interests, the Court will not inquire whether the objection is well founded, unless the excuse is palpably futile and frivolous: *Hughes* v. *Vargas*. (1) As the balance-sheets were submitted for income-tax purposes, and such matters are treated confidentially, it cannot be said that the objection is futile or frivolous.

[WRIGHT J. referred to *Mitchell* v. *Koecker*. (2)]

Wheeler. The objection taken is obviously futile and frivolous. It cannot prejudice anybody to let a liquidator know what returns of income the company which he represents made. If it is contended that the disclosure would be contrary to the public interest, the objection is not taken in the proper way; the head of the department ought himself to come to the Court and state the objection: *Beatson* v. *Skene*. (3) [He also referred to *Hennessy* v. *Wright* (4); *Kain* v. *Farrer* (5); *Reg.* v. *Skeen*. (6)]

Danckwerts. None of the cases say that the head of the department must in every case attend the court. Moreover, there is no head of this department. The Commissioners can only act as a Board. [He also cited *H.M.S. Bellerophon*. (7)]

WRIGHT J. This is an application for an order against an officer of the Board of Inland Revenue to produce certain accounts or balance-sheets of the company upon an examination under s. 115 of the Companies Act, 1862.

(1) (1893) 9 The Reports, 661.
(2) (1849) 11 Beav. 380.
(3) (1860) 5 H. & N. 838.
(4) (1888) 21 Q. B. D. 509.
(5) (1877) 37 L. T. 469.
(6) (1859) 28 L. J. (M.C.) 91.
(7) (1874) 44 L. J. (Adm.) 5.

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The first observation is that the jurisdiction of the Court to order the production of documents is, by the very language of the section, discretionary, and it has been held repeatedly that the jurisdiction to order an examination is discretionary. It seems to me that if I have sufficient evidence that, in the opinion of the Board of Inland Revenue, the public service would suffer by the production of these documents, very strong grounds ought to be shewn before I should be justified in going behind the certificate of the Board. Inland Revenue returns, assuming these documents to be so—and they are not shewn to be anything else—may contain confidential matters. It may be of the utmost importance to the public service that persons should be able to be certain that returns made by them for those purposes should in no case be disclosed. It seems to me that it must be a matter of public concern that persons should have confidence in the secrecy of that procedure. If it were shewn that these documents were not confidential returns, or returns made for the purpose of income tax, but were merely documents belonging to the company which by some accident had got into the hands of the Inland Revenue officers, the case might be different. I do not say that it would; the certificate might still be enough to protect them. But that is not the case here.

The other observation is as to the form in which the objection is taken by the Board of Inland Revenue. I do not say that there may not be cases—I think there may probably be cases—in which it would be right for the Court to insist upon the responsible principal officer, or on some responsible officer of the public department, coming forward and stating to the Court in an authoritative manner that, in the opinion of those best qualified to judge or whose business it is to judge, the production of the document might be prejudicial to the public service. But the current of authority is that that is not essential. In the case of *H.M.S. Bellerophon* (1) the objection was made on affidavit and received; and in *Hennessy* v. *Wright* (2) the members of the Court who delivered judgment seem to have felt no doubt at all upon the point. *Kain* v.

(1) 44 L. J. (Adm.) 5. (2) 21 Q. B. D. 509.

Farrer (1) is not against the contention of the Board in this case, and *Hennessy* v. *Wright* (2) seems to be strongly in their favour.

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My impression is that the practice has been, except in exceptional cases, to receive a certificate properly verified, stating the opinion of the Government authority. Here it is hardly possible to state it in any other way. The members of the Board cannot very well come and claim the privilege for themselves, and it would be mere pedantry to bring the secretary who simply registers their decisions. I think that in point of form the objection is sufficiently taken, and that no ground whatever is shewn for displacing it.

There is also the separate ground that, even if I had power to overrule the objection, I ought not to do so in the exercise of the discretion vested in the Court by s. 115. The application must be dismissed.

F. E.

C. A.

The liquidator appealed. The appeal was heard on January 24, 1900.

P. F. Wheeler, for the liquidator.

Danckwerts, Q.C., and *S. A. T. Rowlatt*, for the Board of Inland Revenue.

The arguments adduced were similar to those used before Wright J., and the same authorities were referred to, and also *Lee* v. *Birrell* (3); *Rex* v. *Clarke*. (4)

The nature of the decision of the Court of Appeal renders it unnecessary to report the arguments at length.

LINDLEY M.R. It is, in my opinion, quite unnecessary for us, and indeed it would not be in accordance with the usual practice of the Court, to decide a speculative case which is not before us. We have to consider whether we ought to overrule the conclusion of Wright J. that it was not necessary or proper or expedient (whichever word you choose to use) to order the production of these documents upon an application made to him under s. 115 of the Companies Act, 1862. [His Lordship read the section, and continued:—]

(1) 37 L. T. 469.
(2) 21 Q. B. D. 509.
(3) (1813) 3 Camp. 337; 1 M. & S. 482.
(4) (1799) 8 T. R. 220.

C. A. 1900 JOSEPH HARGREAVES, LIMITED, *In re.* Lindley M.R.

The language of s. 115 shews that the person who makes the application has no absolute right to an order under the section, and it has been decided over and over again in accordance with the language that the judge has a discretion in the matter, and that if he has exercised his discretion the Court of Appeal will not readily interfere with it. I do not say the Court has not jurisdiction to do so, that would perhaps be going too far, because there might be cases in which there had been such a serious miscarriage of justice and such a wrongful exercise of the discretion that the Court of Appeal could interfere; but primâ facie this Court will not interfere.

What are the facts here? We are told that a misfeasance summons has been taken out by the liquidator against (among others) the auditors of the company, and the liquidator very naturally wants to obtain information in support of his summons. Therefore he applies to the Court for an order upon the surveyor of taxes for the district, who has in his possession or physical custody some returns made by the company for income-tax purposes, to produce those documents. The surveyor, acting I suppose under general instructions from the Board of Inland Revenue, objects. The matter is then considered by the Board, and we have a certificate that, in their opinion, after duly considering the question, the production of the documents referred to in the summons "would be prejudicial and injurious to the public interests and service." Thereupon Wright J. said, In the face of that, so far as I have a discretion in the matter, I decline to make any order. We are asked to reverse that decision. I decline to do anything of the sort. I do not intend to say what is the limit of the power of the Court (if there is a limit) to order the production of such documents as these, but I do say that when the learned judge below has come to the conclusion that under s. 115 they ought not to be produced—that it is not expedient that they should be—this Court ought not to interfere. In my opinion this appeal ought to be dismissed, and with costs.

VAUGHAN WILLIAMS L.J. I entirely agree. It is not, as I understand, denied that communications made to the Board of Inland Revenue are documents which come within the rule

which enables the heads of Government departments to object on their own responsibility to their production. At all events, if this were disputed, it seems to me that there is ample authority that such a contention would be ill-founded. Under these circumstances it is said here that the discretion of the learned judge was wrongly exercised, because he had not before him the head of the department. In my opinion we ought not to review the exercise of his discretion upon any such ground, especially where the production is asked upon the examination of a witness under s. 115, which expressly puts the matter in the discretion of the judge.

I only wish to make one observation with regard to *Kain* v. *Farrer*. (1) There the Board of Trade had put forward the defendant, their secretary, as the person to represent the Board, and service of the writ had been accepted by him as representing the Board, and in the course of that litigation the production of documents in the ordinary form of discovery was asked for. It is plain that the rules which would guide the Court as to what affidavit ought to be made by a defendant representing a department of the State are entirely different from the rules which would be applied in a case in which the officer of a department was merely subpœnaed as a witness. The officer of the department is merely the custodian of the documents as the servant of the department, and the department have not in the present case put forward their servant in the sense of representing them.

ROMER L.J. I agree. I will only add that, in my opinion, the question now before us is not necessarily the same as that which may possibly arise upon the hearing of the misfeasance summons if the judge has then to consider the question of a subpœna for the production of these documents.

Solicitors: *Jaques & Co., for Neill & Holland, Bradford; Solicitor of Inland Revenue.*

(1) 37 L. T. 469.

W. L. C.

C. A.
1900
Jan. 26, 27.

In re GLUBB.
BAMFIELD *v.* ROGERS.

[1895 G. 1445.]

Voluntary Gift—Innocent Misrepresentation of Fact—Common Mistake—Equitable Right of Donor to Recover.

When a voluntary gift is obtained by means of an innocent misrepresentation of fact by the donee, the donor, on the discovery of the mistake, has a right in equity (though he may have none at law) to recover his gift.

Wilson v. *Thornbury*, (1875) L. R. 10 Ch. 239, 249, not followed in this respect.

APPEAL against a part of the order of North J. on the second further consideration of this action, which was brought for the administration of the estate of the Rev. P. S. Glubb, who died in April, 1891.

By his will, dated May 7, 1889, he gave (inter alia) legacies to seven charitable institutions, namely, 1000*l.* to the Royal Society for the Prevention of Cruelty to Animals, and 800*l.* to each of the following: the Cornwall Royal Infirmary, the National Industrial Home for Crippled Boys, Dr. Barnardo's Homes, the Western Counties Idiot Asylum, the Earlswood Asylum for Idiots, and the British Homes for Incurables. These legacies were all to be subject to the following general conditions: "The conditions to be strictly enforced and exacted on and from each and every benevolent or charitable institution to be benefited by or named in this my will, before participating in its provisions are these—viz., each such society or institution shall not be entitled to receive all or any part of my respective benefactions hereinbefore mentioned in their favour until the would-be recipient shall produce indisputable proof, or such as would satisfy the county court judge, that my respective legacy has been the means of obtaining fresh donations respectively to meet my gift, either entirely or in part—that is to say, pound for pound, thus doubling the sum in each case taken or obtained from my estate under this my will. A committee of not less than three persons connected with such

institution, and of whom no officers or managers shall form a part, or any one in his private capacity pecuniarily interested, shall adduce proof and evidence that my bequest has attracted fresh donations or subscriptions which otherwise would not have been proffered or rendered, or, in other words, were given to meet my bequest, while such proofs and evidence shall be submitted, not only to my trustee and executors, but on demand to the other societies benefited by my will, who would have a residuary interest derived from a provision hereinafter mentioned, and, finally, to the persons interested finally in the residue not disposed of otherwise by my will. A final appeal would be made to the county court of the county wherein the institution was established. And it is my will that the whole or any part of these charitable bequests respectively not absorbed or taken up, or not met with equivalent sums as aforesaid, shall, after four years, be offered to the other charitable institutions herein named, observing the order appointed by me as regards priority, and reasonable time be allowed to each seriatim to avail itself of my gift as before prescribed; provided that at the end of seven years have expired (*sic*) all such sums not taken up shall sink into my residuary estate hereinafter disposed of."

The Court decided that the periods of four and seven years mentioned in this clause ran respectively from the date of the testator's death.

Two only of the seven charities, namely, the Home for Crippled Boys and the Earlswood Asylum, qualified themselves to receive their original legacies of 800*l.* each by raising within the four years an equal amount by means of subscriptions to meet the legacies to them respectively. The result was that 4200*l.*, the amount of the other five legacies, lapsed, and under the terms of the above clause of the will was to be offered to each of the seven institutions in the order mentioned in the will, excluding in each case the amount of the original legacy to the institution.

The committee of the Cornwall Infirmary were not informed of their legacy of 800*l.* until after the expiration of four years from the death of the testator.

C. A. 1900 GLUBB, *In re.* BAMFIELD *v.* ROGERS.

After they had been informed of the legacy, but before the Court had decided that the four years ran from the testator's death, they issued the following circular, dated September 3, 1896:—

"The committee of the Cornwall Royal Infirmary are most anxious to raise a sum of 800*l.*, so as to secure a similar amount under the will of the late Rev. P. S. Glubb.

"They have already received or had promises of 673*l.* 13*s.* 1*d.*, and they still want 126*l.* 6*s.* 11*d.* to complete the 800*l.*; but unless this sum is raised in less than a month from the present date, they will be unable to secure the 800*l.* equivalent. Under these circumstances they venture to ask for your kindly help to secure this sum, as it will be of the greatest advantage to the institution.

"It is necessary that all the sum required should be handed to the secretary by the 24th inst."

In answer to this circular further subscriptions were obtained, the whole amount thus raised being 843*l.* 16*s.* 6*d.*

After this sum had been raised it appeared by the above-mentioned decision of the Court that it had not been raised in time, and that the legacy of 800*l.* had, therefore, lapsed.

In July, 1896, the committee of the Royal Society for the Prevention of Cruelty to Animals issued a similar circular, and obtained subscriptions amounting to 1288*l.* 18*s.* 8*d.* to meet the legacy of 1000*l.*, but this sum also was raised too late, and the legacy of 1000*l.* lapsed.

The committee of Dr. Barnardo's Homes in the same way raised 712*l.* 6*s.* 4*d.* to meet the legacy of 800*l.*, but this was not sufficient to comply with the condition imposed by the testator, and their legacy of 800*l.* also lapsed.

On December 23, 1897, the committee of the Cornwall Infirmary issued the following circular:—

"In September, 1896, the committee issued an appeal for 800*l.*, so as to secure a similar amount under the will of the late Rev. P. S. Glubb.

"In answer to the appeal, subscriptions were received to the amount of 887*l.* 12*s.* 2*d.*

"The estate of Mr. Glubb is being administered in the High

Court of Justice, several questions having arisen as to the meaning of his will.

"The Court has very recently decided that, as the 800*l.* to meet the legacy of that amount was not raised within four years from the testator's death, the infirmary is not entitled to the legacy primarily given to it. As a matter of fact, the committee were not informed of the legacy, and so could not issue their appeal until after the four years had expired.

"The Court, however, has, fortunately for the infirmary, decided that it is entitled to take up another legacy of 1000*l.* (primarily given to another institution, which has similarly failed to qualify for it) subject to the conditions of the will being satisfied within a short time. In order to secure this, the committee intend, with the consent of the subscribers, to utilise, as part of the fund necessary to be raised, the 887*l.* 12*s.* 2*d.* already subscribed as above.

"The committee, therefore, now ask the subscribers' assent to this course, and appeal for a further sum of at least 112*l.* 7*s.* 10*d.*, to make up the 1000*l.* which the will requires as the condition of taking the legacy, to be subscribed by fresh donations or subscriptions, that would not have been proffered or rendered otherwise than to meet the bequest.

"The infirmary may be also entitled to take up some further legacy under the will, in whole or in part, if more than the 1000*l.* is subscribed. If less is subscribed the legacy will be reduced pro ratâ."

The statement in this circular that 887*l.* 12*s.* 2*d.* had been received in answer to the first circular was incorrect; in fact only 843*l.* 16*s.* 6*d.* (as was afterwards found by the chief clerk in this action) had been so received. In answer to this circular the subscribers of that amount expressed in writing their assent to the application of their subscriptions to meet the deferred legacy; and further subscriptions to the amount of 127*l.* 6*s.* 6*d.* were obtained for the same purpose.

The committee of the Royal Society for the Prevention of Cruelty to Animals also issued a similar second circular, in reply to which the persons who had subscribed the 1288*l.* 18*s.* 8*d.* expressed their assent to the application of their

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subscriptions to meet the 3200*l.*, the amount of the lapsed legacies offered to the society, and a further sum of 1925*l.* was subscribed for that purpose.

The committee of Dr. Barnardo's Homes also obtained further subscriptions to the amount of 77*l.* 16*s.* 8*d.* to meet the lapsed legacies.

The question then arose, whether the sums which had been raised by the Royal Society for the Prevention of Cruelty to Animals and the Cornwall Infirmary respectively to meet their original legacies could be applied in order to qualify them to share in the lapsed legacies.

North J. held that the persons who had subscribed in order to meet the original legacies would not, when it was discovered that their subscriptions had been obtained after the expiration of the four years limited by the will, have been entitled to demand the repayment of their subscriptions, and that consequently those subscriptions could not be applied to meet the deferred legacies in accordance with the conditions of the will.

The result was that the Royal Society for the Prevention of Cruelty to Animals was entitled to the deferred legacies to the amount of 1925*l.*, the Cornwall Infirmary to the amount of 127*l.* 6*s.* 6*d.*, and Dr. Barnardo's Homes to the amount of 77*l.* 16*s.* 8*d.*

The Royal Society for the Prevention of Cruelty to Animals and the Cornwall Infirmary appealed.

Warmington, Q.C., *Vernon Smith, Q.C.*, and *J. G. Wood*, for the appellants, contended that when the mistake was discovered the subscribers who had given their money to meet the original legacy would have been entitled to demand the return of their subscriptions. Consequently they were entitled to appropriate their subscriptions to meet the deferred legacy, and in this way the condition imposed by the testator was satisfied. The result was that the Royal Society for the Prevention of Cruelty to Animals had raised 3213*l.* 10*s.* 8*d.*, which was more than enough to meet the four lapsed legacies of 800*l.* each offered to them, and they were entitled to receive 3200*l.* And the Cornwall Infirmary were entitled to receive in respect of the lapsed

legacy of 1000*l.* offered to them the sum of 971*l.* 3*s.* This would leave 14*l.* 8*s.* 4*d.* for Dr. Barnardo's Homes.

Rawlins, *Q.C.*, and *R. J. Parker*, for the residuary legatees, contended that a voluntary gift made in consequence of an innocent misrepresentation of fact could not be recovered by the donor when the mistake was discovered. There was in such a case no failure of consideration, for there was no consideration, and the motive of the donor could not be taken into account.

[VAUGHAN WILLIAMS L.J. In *Wilson* v. *Thornbury* (1) James L.J. said (speaking of a sum of 300*l.* which the defendants sought to recover from one of the plaintiffs on the ground that she had obtained it by fraud): "It was simply a voluntary gift founded on a common mistake, and cannot now be recovered."]

That applies here; there was a mistake common to the donors and the donees.

Austen-Cartmell, for the executors.

LINDLEY M.R. It appears to me, looking at the will, which is a curious one, that in substance the conditions imposed by the testator have been performed. We start first of all with this clause: [His Lordship read the gift of the original legacies to the seven charities, and continued:—]

This is a somewhat cumbrous clause, but it means this. Take, for example, the Cornwall Infirmary, to which a legacy of 800*l.* is given on a condition. The condition means that they are not to have the legacy until they have got 800*l.* subscribed by others so as to double what the testator gave. "You must go to the public and obtain subscriptions to the amount of 800*l.* before you can get my legacy." That is the meaning of it. Then the testator inserts what I may call machinery for ascertaining whether the condition has been performed or not. Then he goes on: "and it is my will that the whole or any part of these charitable bequests respectively not absorbed or taken up or met with equivalent sums as aforesaid shall after four years be offered to the other charitable

(1) L. R. 10 Ch. 239, 249.

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institutions"—there is what may be called a deferred legacy, so that if one of the charitable institutions does not get the legacy given to it in the first place the others are to have the chance of getting it—"the other charitable institutions herein named, observing the order appointed by me as regards priority, and reasonable time be allowed to each seriatim to avail itself of my gift as before prescribed; provided that at the end of seven years have expired (*sic*) all such sums not taken up shall sink into my residuary estate hereinafter disposed of." In other words, if within four years the condition has not been performed upon which the 800*l.* is to be payable, an offer of it is to be made to the other institutions seriatim "to avail itself of my gift as before prescribed." They must perform a similar condition by obtaining enough subscriptions to entitle them to the deferred legacy, and if they do not do that within seven years, then so much of the deferred legacies as is not thus earned is to go to the residuary legatees. It is a cumbrous piece of machinery, but one can see the object of it. The testator says, "I will give so much money to a charitable institution, provided the public give as much more," and this is the machinery which he has adopted for the purpose of inducing the public to subscribe. It is a bribe to the public to subscribe. It is a conditional gift to the charitable institution. He says, "If you cannot get as much from the public you shall not have it from me."

Now, let us see what has been done. The four years are to be calculated from the death of the testator. That has been already decided, and, so far as I can judge without a more careful study of the will, quite rightly. That, however, was not the view taken by the persons concerned. They allowed the four years to elapse, and did not comply with the condition within that period. They found this out after the four years had expired, and, as they had lost their immediate legacies, they set to work and endeavoured to obtain something out of the deferred legacies. I will take what the Cornwall Infirmary did as a specimen. In September, 1896, they sent this circular to persons whom they thought likely to subscribe: [His Lordship read the first circular above stated, and continued:—]

This was evidently written in the belief that the four years had not yet expired. There is in it a plain intimation that they are in time to obtain the original legacy. Any one reading this circular and subscribing on the faith of it would so understand it. It is not consistent with it that it was impossible, do what they would, for them to become entitled to the 800*l.* under the will. It was a representation that they could. In other words, it was a statement that they were in time when in fact they were not. They obtained money upon the faith of this circular, and then they discovered that they had made a blunder. Now let us pause and consider the position of those persons who had subscribed their money on the faith of this circular. What was their position? In my opinion they were entitled (I do not suppose they would have exercised their right), but they were entitled on the principles of equity (I do not say of common law) to say to the managers of the institution, "You have induced us by a misrepresentation (innocent, if you please) to subscribe to your fund, and, now that we know the real facts, we must have our money back." I think the managers of the institution took that view themselves, because, when they had found out their blunder, they sent out this second circular to the subscribers: [His Lordship read the circular of December 23, 1897, and continued:—] They tell the subscribers that the subscriptions which had been given on the footing of the first circular had been founded upon a mistake of fact by the recipients—in other words, had been induced by an innocent misrepresentation of fact made by them. In truth, the committee were not informed of the legacy, and could not, therefore, issue their appeal for subscriptions until after the four years had expired. What, then, did the subscribers do? In answer to this second circular they gave their written consent to the application of their subscriptions to meet the deferred legacy. Well, then, looking at this transaction and at the terms of the will as to the deferred legacy, we have to consider to what extent this institution has entitled itself to share in the deferred gift—that is, whether the amount which it has obtained by this machinery can be applied to entitle it to share in the deferred legacy. Looking at the matter fairly and impartially, it appears to me

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that it can. The committee had corrected the blunder with the consent of the subscribers. Notwithstanding what fell from James L.J. in *Wilson* v. *Thornbury* (1), I think the subscribers could, when the mistake was discovered, have got their money back, if they had chosen to demand it, and, having the right to do that, they elected to have their money applied to meet the deferred legacy. In other words, if the gifts were voidable in equity (I do not say they were voidable at law), the subscribers have elected not to avoid them, but they consented to appropriate their former subscriptions to meet the deferred legacy. I think we should be splitting straws if we were not to say that this condition has been performed in substance and in fact. I think the learned judge has taken an erroneous view upon this point.

VAUGHAN WILLIAMS L.J. I agree, because I am told by those who know the doctrines of equity better than I do, that the subscribers would, according to those doctrines, have been able to recover their subscriptions upon its turning out that at the time when it was represented by the circular that the institution was in a position to obtain the original legacy under the will this was not the fact, because, upon the true construction of this somewhat difficult will, it turns out that, at the time the circular was issued, the legacy had already lapsed. If I had been left to my own judgment in the matter, I am not sure that I should not have arrived at the conclusion at which James L.J. arrived in *Wilson* v. *Thornbury*. (1) I hope that our treating this circular issued by a charitable institution as if it had been a prospectus issued by a company will not result hereafter in consequences which we should deplore. People who by means of speculation or otherwise are on the top of the wave are apt to be somewhat liberal in their subscriptions made upon the basis of appeals issued by charitable institutions. Such donors might afterwards become bankrupt, and their creditors might then say, "This gift was obtained upon a representation of fact which turns out to have been erroneous, and we think the money ought now to be

(1) L. R. 10 Ch. 239, 249.

handed over to the creditors for distribution amongst them." It may be, however, that if such a case should arise, it would be possible to find some distinction which would enable us to avoid such a result.

ROMER L.J. I agree in thinking that the appeal should be allowed. For the sake of clearness I will refer to the first gift to either of the appellant institutions—the direct gift in the first instance—as the original gift, and to the gift in default of the original gift to the other institutions taking effect as the deferred gift. I need not distinguish between the two appellant institutions, for practically to my mind their cases are identical. Therefore, for the sake of clearness, I will deal with the case as if there had been only a single appellant institution. That which happened in my view is in substance as follows: The committee of the institution wrote to their subscribers, and represented to them that the institution was in a position to obtain the testator's original gift if subscribers would come forward with their subscriptions before a specified date. On the footing and the faith of that representation of fact subscribers gave their money. It is perfectly clear, both from the terms of the circular which was sent and from the objects which we know both the committee and the subscribers had in their minds, that the money was subscribed solely for the purpose of obtaining the original gift. So it is clear that the subscriptions were given in reliance upon and solely because of the representation of fact which I have mentioned. After the subscriptions had been obtained the committee found that they had made a mistake, and that they were not at the time when they obtained the subscriptions in a position to obtain the original gift. So that the representation of fact which they had made was not true in substance—was indeed untrue, though of course in stating it as a fact the committee were not knowingly guilty of any deception. When the committee found that the representation—the sole representation of fact which induced the subscriptions—was untrue, what followed? The committee were not in a position to say, as against the subscribers who had advanced their money

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solely because of that representation of fact, that their subscriptions should be retained. There was a duty cast upon the committee to offer to return the money to the subscribers if they wished it, and to say to the subscribers, "Now you know the true facts, what will you do with your money?" And the subscribers, in my opinion, had the right, when they were told the true facts, to say, "We will dispose of the money now as we wish, in this way or in that way." The committee, in my view, acted honestly in this matter, and in accordance with their duty. They sent a circular to the subscribers, saying in substance, "These are the true facts. We find we have made a misrepresentation to you. The grounds on which we obtained this money were wrongly set forth. You are now in a position to deal with this money as you choose. But there is in the will a deferred gift, and we call your attention to that. Will you, as the persons who have now the dominion over these subscriptions, allow them to be applied for this deferred gift?" And the subscribers said, "Yes, we will." I do not mean that the precise language I have used is that which is to be found in the documents to which I have referred, but it is the substance and the meaning of those documents.

That being so, the subscriptions to the deferred gift stood, in my opinion, in the same position as if the subscriptions to the original gift had never been made. They were obtained on the footing and faith and for the purposes of the deferred gift, and, that being so, in my opinion they fall exactly within the words of the will. The deferred gift has, to use the testator's words, "attracted fresh donations or subscriptions which otherwise would not have been proffered or rendered, or, in other words, were given to meet my bequest," and it follows that the institution has, in respect of this deferred gift, fulfilled the conditions of the will, and to the extent of these subscriptions is entitled to the deferred gift.

Solicitors: *Coode, Kingdon & Cotton; Robbins, Billing & Co.; Mackrell, Maton & Co., for R. N. Rogers, Falmouth.*

W. L. C.

C. A.
1900
Feb. 3.

In re GENERAL RAILWAY SYNDICATE.

WHITELEY'S CASE.

[00236 of 1898.]

Company—Winding-up—Contributory—Rescission of Contract to take Shares—Time within which to take Proceedings.

Where a company applied under the Rules of the Supreme Court, Order XIV., for leave to sign final judgment in an action for calls, and leave to defend was obtained by the shareholder upon an affidavit stating his intention to counter-claim for rescission of the contract to take shares on the ground of misrepresentation, and disclosing no other ground of defence, and this occurred before the presentation of a winding-up petition, but the counter-claim was delivered after the petition and before the winding-up order made upon it:—

Held, that the shareholder was not too late to apply for relief.

Ex parte Stevenson, (1867) 16 W. R. 95, distinguished.

Decision of Wright J. reversed.

APPEAL from a decision of Wright J. (1)

On June 15, 1896, 5000 1*l.* shares in the above-named company were allotted to W. A. Whiteley. On December 22, 1897, a call was made of 5*s.* per share, which was payable in the following January. On June 27, 1898, the company commenced an action against Whiteley to recover the amount of the call, and on July 12 served him with a summons for leave to enter final judgment under Order XIV. On July 15 Whiteley filed an affidavit in opposition to the summons, wherein, after a formal denial of indebtedness, he stated that he had been induced to apply for the shares by misrepresentation on the part of the company, and that he intended to counter-claim for rescission of the contract and to have his name removed from the register of members, and on July 20 he obtained unconditional leave to defend. On July 22 a petition was presented for the compulsory winding-up of the company, and on August 3 a compulsory winding-up order was made upon the petition. In the meantime, on August 2, Whiteley put in a defence to the action, and delivered a counter-claim for

(1) [1899] 1 Ch. 770.

C. A. 1900 WHITELEY'S CASE.

rescission of the contract and rectification of the register and for an injunction to restrain the company from enforcing the calls. The liquidator having settled Whiteley on the list of contributories in respect of the 5000 shares, Whiteley issued a summons asking that his name might be struck off the list, with leave to raise the question whether it was too late for him to set up a case of misrepresentation against the company.

Wright J. held that the applicant was not entitled to be relieved from his shares, since the counter-claim was not delivered until after the presentation of the winding-up petition. The applicant appealed.

Upjohn, Q.C., and *W. Whately*, for the applicant. The learned judge has held that the applicant has not complied with the rule laid down in *Reece River Silver Mining Co.* v. *Smith* (1) and *In re Scottish Petroleum Co.* (2) that a shareholder who seeks to repudiate his shares on the ground of misrepresentation must take proceedings to have his name removed from the register before the commencement of the winding-up. But obtaining leave to defend an action for calls upon the basis of an affidavit setting forth facts involving a counter-claim for rescission is equivalent to bringing a counter-claim for that purpose, and, having regard to the alterations in procedure effected by the Judicature Act, it is a proceeding by the shareholder to obtain the removal of his name from the register within the spirit if not within the letter of the rule. If the action had been put down in the short cause list the affidavit would have been treated as a counter-claim without any further proceeding. The applicant is in the same position as if under the old practice an action for calls had been brought against him, and he had filed a bill in Chancery for rescission. No doubt it has been held that a defence to an action for calls on the ground of misrepresentations in the prospectus was not of itself a sufficient assertion of the right to repudiate: *Ex parte Stevenson.* (3)

[VAUGHAN WILLIAMS L.J. It seems difficult to reconcile

(1) (1869) L. R. 4 H. L. 64. (2) (1883) 23 Ch. D. 413.
(3) 16 W. R. 95.

that decision with *McNiell's Case* (1), which was recognised as an authority by Baggallay L.J. in *In re Scottish Petroleum Co.* (2)]

In *Ex parte Stevenson* (3) the defendant was simply defending, but here the applicant is partly defendant and partly plaintiff, and that case is not applicable to the changed state of circumstances brought about by the Judicature Act. Having regard to the procedure by counter-claim introduced by that Act, the applicant was not bound to go to the expense of commencing a fresh action in the Chancery Division, and that would not be the proper practice. He has not merely repudiated the contract, but has taken a step to enforce his repudiation, and has brought himself within *Reece River Silver Mining Co.* v. *Smith.* (4)

Hon. E. C. Macnaghten, Q.C., and *Peterson*, for the liquidator. In *In re Scottish Petroleum Co.* (2) the Court of Appeal laid down a definite rule which the applicant has not observed. What step has he taken to obtain the removal of his name from the register? Defending an action for calls on the ground that the contract for shares was induced by fraud is not of itself sufficient: *Ex parte Stevenson.* (3) Nor is filing an affidavit stating his intention to counter-claim for rescission sufficient. The question is not affected by the proceedings under Order XIV., for the leave obtained was to defend, not to put in a counter-claim; no leave was required for that. It is the misfortune of the applicant that his counter-claim was not delivered until after the winding-up petition was presented. This appeal, even if successful, will not help the applicant, since, apart from the winding-up proceedings, he is barred by laches and acquiescence from asserting his claim.

LINDLEY M.R. I do not think that the case, although novel, is really difficult, although I am unable to come to the same conclusion as the learned judge upon it.

We have now to consider what effect the new practice introduced by the Judicature Act has upon the rules which have

(1) (1870) L. R. 10 Eq. 503.
(2) 23 Ch. D. 413.
(3) 16 W. R. 95.
(4) L. R. 4 H. L. 64.

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WHITELEY'S CASE.

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been laid down respecting proceedings taken to get one's name removed from the register when winding-up proceedings are imminent.

The old practice was settled, and the rule was laid down by the Court in *In re Scottish Petroleum Co.* (1) It is very difficult for judges to frame language which is adapted to all possible contingencies; they frame it with reference to the circumstances with which they have to deal. But the real question is whether what has been done by the applicant here is not equivalent for all practical purposes, and for all legal purposes, to taking proceedings to have his name removed from the register. In my opinion, it is.

Here is a person on the register of members, and primâ facie a shareholder, and, before any petition to wind up was presented, an action was brought against him for calls, and a summons was taken out under Order XIV. That introduces the new practice. What is the effect of that? The applicant had two courses open to him. He could immediately commence a cross-action for rescission—there is no doubt about that; but he could also not only defend the action, but put in a counter-claim raising the question of his right to rescind. There were thus two ways of raising that question. Under the old practice there were not, and it was settled that a shareholder could not acquire a right to rescind by simply defending an action for calls. That may account for the decision of Rolt L.J. in *Ex parte Stevenson.* (2) In this case the applicant did not, as he might have done, bring a cross-action to rescind, but he took the other alternative of asserting his right to rescind in the action for calls, and he applied for leave to defend. After the summons had been taken out under Order XIV. he could not defend without leave, and I cannot help thinking it would have been rather a vexatious proceeding, considering that he could do everything he wanted in one action, to start another.

The summons for leave to sign judgment having been issued, he filed an affidavit which shews no defence at all apart from the right to rescind. It starts with a formal statement that

(1) 23 Ch. D. 413. (2) 16 W. R. 95.

the deponent is not indebted. That goes for nothing unless you can find some circumstances which can throw light upon it and give rise to some reason for supposing that that is a true statement. I disregard that altogether. Then the whole of the rest of the affidavit shews nothing more nor less than a right to repudiate the shares and to have the contract rescinded, and it is upon that affidavit that he gets leave to defend.

Now, it is true that the petition to wind up was presented before he could put in his counter-claim. If he had put in his counter-claim the case would not have been arguable. The difficulty arises from the fact that he had not put in his counter-claim. But he got leave to defend upon the affidavit to which I have referred, and I think that he did all that could be reasonably expected to assert in a legal proceeding his right to repudiate these shares. That is the principle on which the Courts have acted in several cases.

Whether *Ex parte Stevenson* (1) went a little too far or not it is unnecessary to consider. One can easily see that it would lead to very extraordinary results, because, supposing that in an action for calls the defendant pleaded that he had been induced to take his shares by fraud and repudiated his shares, and that were tried out, it would be very difficult to see how he could be made a contributory after that, assuming that he was successful. However, I say nothing more about it. We are asked to extend what was done by Rolt L.J. under the old practice to a new practice which has entirely altered the procedure. I think that would be wrong. In substance the applicant has taken legal steps before the commencement of the winding-up to have his name removed from the register. Therefore, upon this preliminary point, I think that the order must be set aside and the matter must go back to the learned judge.

VAUGHAN WILLIAMS and ROMER L.JJ. concurred.

Solicitors: *Ward, Perks & McKay; Hays, Schmettau & Dunn.*

(1) 16 W. R. 95.

H. B. H.

C. A.
1900
Feb. 5.

JONES *v.* BARNETT.

[1898 J. 552.]

Sale under Order of Court—Protection of Purchaser—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 70, *sub-s.* 1.

Sect. 70, sub-s. 1, of the Conveyancing Act, 1881, which provides that "an order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of (inter alia) want of jurisdiction," does not operate to give a good title to a purchaser at a sale under an order of the Court when the Court in making the order supposed that it was dealing with an interest belonging to a judgment debtor, though it in fact belonged to a person not a party to the proceedings and not bound by them.

Under such circumstances, notwithstanding the order of the Court and the provisions of s. 70, that person has a good title as against the purchaser.

Decision of Romer J., [1899] 1 Ch. 611, affirmed.

Appeal against the decision of Romer J. (1)

By the action the plaintiff Mary Jones claimed possession and mesne profits of a leasehold house and two freehold cottages, situate at Aberavon, in Glamorganshire.

By his will, dated August 1, 1886, John Williams devised and bequeathed his real and personal estate (which included the above-mentioned house and cottages) to trustees, upon trust as to his real and chattel real estate to permit his wife to receive the rents to arise therefrom during her life, and after her death he bequeathed the leasehold house to his nephew Isaac Jones for such term as the testator had therein at his decease, and he devised the two freehold cottages unto and to the use of Isaac Jones.

In 1894 Isaac Jones was indebted in the sum of 350*l.* to Philip Jones, whose wife, the plaintiff Mary Jones, was the sister of Isaac Jones.

By a deed, dated May 31, 1894, and made between Isaac Jones of the first part, Philip Jones of the second part, and Mary Jones of the third part, after a recital of the will of John

(1) [1899] 1 Ch. 611.

Williams and his death, and that Isaac Jones was indebted to Philip Jones in the sum of 350*l.*, it was witnessed that, in consideration of the sum of 350*l.*, Isaac Jones, as beneficial owner, assigned to Mary Jones, and Philip Jones thereby confirmed, all the share, right, title, and interest to which Isaac Jones in his right was then, or should or might thereafter be, entitled under the recited will, to hold the same unto Mary Jones absolutely.

On February 26, 1890, Barnett (the defendant to this action) recovered judgment for 450*l.* against Isaac Jones in an action in the Queen's Bench Division, and on March 14, 1895, an order was made in that action appointing a receiver of the reversionary interest of Isaac Jones in the above-mentioned leasehold house and freehold cottages.

On July 10, 1895, a petition was presented by Barnett under the Judgments Act, 1864, asking for a sale of the interest of Isaac Jones in the property of which the receiver had been appointed.

On July 24, 1895, an order was made by Chitty J. on this petition, directing an account to be taken of what was due to the petitioner under his judgment, and that an inquiry should be made what interests of Isaac Jones had been delivered in equitable execution by the appointment of a receiver; an inquiry whether there were any, and (if any) what liens, charges, or incumbrances on the interest in land of Isaac Jones, their amounts and priorities, and of those which were prior and which subsequent to the receivership order, and which (if any) created subsequently to that order were before its registration created in favour of a purchaser for value; and it was ordered that Isaac Jones should pay what should be certified to be due within one month after the chief clerk's certificate; and that, in default of his paying the amount so certified, his said interests in land should be sold, with the approbation of the judge, free from all liens, charges, or incumbrances created subsequent to the order of March 14, 1895, except any such created in favour of a purchaser for value before the registration of that order.

On January 20, 1896, the chief clerk certified that 509*l.* 19*s.*

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was due from Isaac Jones, that the property consisted of the leasehold shop and freehold cottages above mentioned, and that there were no charges or incumbrances on Isaac Jones's interest therein.

Isaac Jones not having paid any part of his debt, the property was put up for sale by auction on December 16, 1896, when the defendant Barnett, who had obtained leave to bid at the sale, was declared the highest bidder for 375*l.*, and by an order dated February 19, 1897, it was directed that a person should be appointed to convey the interest of Isaac Jones in the property to Barnett, and a conveyance to him was subsequently executed.

The tenant for life died on March 16, 1897. Barnett then took possession of the property, and the deeds relating to it were subsequently handed over to him by the executors of John Williams.

Neither the defendant Barnett nor his solicitor had any notice or knowledge of the assignment to the plaintiff of May 31, 1894, until a letter came from the plaintiff's solicitor to Barnett's solicitor on April 15, 1897, claiming that the plaintiff Mary Jones was entitled to the property under the assignment.

This action was then brought to recover possession of the property. Isaac Jones was made a defendant, but did not appear.

The defendant claimed that, by virtue of s. 70, sub-s. 1, of the Conveyancing Act, 1881 (1), he had acquired a better title than the title of the plaintiff, which was prior in date.

Romer J. was of opinion that "if an order of the Court dealing with property, having regard to its terms and the proceedings in which and the circumstances under which it was made, would not be held, apart from s. 70, to be intended to bind any particular estate or interest in the property, then that estate or interest would not be bound by the order by reason or virtue of the section." And the learned judge accordingly held

(1) By s. 70, sub-s. 1, "An order of the Court under any statutory or other jurisdiction shall not, as against a purchaser, be invalidated on the ground of want of jurisdiction, or of want of any concurrence, consent, notice, or service, whether the purchaser has notice of any such want or not."

that s. 70 did not enable the defendant to resist the plaintiff's claim, but that she was entitled to recover possession of the property and mesne profits.

The defendant appealed.

Neville, Q.C., and *W. F. Phillpotts*, for the defendant. The effect of s. 70, sub-s. 1, is to give the defendant a superior title: *In re Hall Dare's Contract.* (1)

[LINDLEY M.R. In that case there was a mere irregularity. It is a very different thing to say that s. 70 enables the Court to sell the property of the wrong man. An order of the Court does not bind persons who are not parties to it.]

In *In re Hall Dare's Contract* (1) there was an outstanding estate, and the Court had no power to dispense with service on the persons entitled to that estate.

Another authority is *Mostyn* v. *Mostyn* (2), and it shews that by s. 70 the defendant has acquired a good title under the order of the Court. With the "concurrence" or "consent" of Mary Jones he would have had a good title, and s. 70 cures the defect arising from the want of that concurrence or consent. In *Mostyn* v. *Mostyn* (2) it was held that puisne incumbrancers, who had not consented to an order for sale of the incumbered property, were bound by the order, and that the purchaser obtained by virtue of s. 70 a good title to the property free from the puisne incumbrances. That decision governs the present case. The result may appear startling; but how can the Court without legislating draw a distinction between interests which an order was intended to affect and interests which it was not intended to affect? The question is, what was the property which the Court intended to sell?

Again, on the true construction of the indenture of May 31, 1894, only a life interest in the property passed to Mary Jones. There are no words of limitation. Subject to that life interest the legal estate remained in Isaac Jones, and that interest of his passed to the purchaser under the order for sale.

T. B. Napier (*Bramwell Davis, Q.C.*, with him), for the plaintiff, was called on only as to the last point. If the plaintiff

(1) (1882) 21 Ch. D. 41. (2) [1893] 3 Ch. 376.

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takes only a life interest, still the order as drawn up is right. It only declares the plaintiff to be entitled to possession of the property, and to that she would be entitled at any rate during her life.

LINDLEY M.R. I think there is no real difficulty in this case, unless we are asked to redraft s. 70. What is the good sense of the thing? In making the order for sale the Court was dealing with property which it did not decide, but which it assumed, to belong to Isaac Jones. The order dealt with the property as being his. It turns out that at that time it was not his at all, but that it belonged to Mary Jones. In this state of things it is said that the purchaser has acquired a good title to the property as against her by virtue of s. 70. That cannot, in my opinion, be the true construction of the section. Although no doubt some difficulty arises from the use of the words "on the ground of want of jurisdiction," it would be contrary to common sense and sound principle to say that the Legislature was aiming at anything of that sort. There is no case which touches that aspect of the matter. In neither of the cases which have been referred to had the Court made an order for the sale of the wrong man's property. In *In re Hall Dare's Contract* (1) the Court was not selling property of a person other than it supposed. There was merely an objection to the regularity of the form of the order. There is no doubt some little difficulty by reason of what the Court said in *Mostyn* v. *Mostyn*. (2) But the decision was only that the purchaser would get a good title without the concurrence of some puisne incumbrancers, and, if the Court had jurisdiction to sell, it became a mere question of regularity in the machinery.

We are asked to go much further than that. I do not propose to redraft s. 70. But it should be observed that it begins by assuming that the Court has made an order under its jurisdiction, statutory or otherwise, and the words "shall not be invalidated on the ground of want of jurisdiction" are introduced to cover any irregularity of procedure which might possibly affect the jurisdiction and invalidate the

(1) 21 Ch. D. 41. (2) [1893] 3 Ch. 376.

order. I am not disposed to cut down the operation of the section, but the effect which it is now sought to give to it is so obviously wrong that it is impossible to consider that to have been the intention of the Legislature. They could not have intended to enable the Court to sell the property of B. when it supposed it was selling the property of A., B. not being a party to the proceedings. The appeal must be dismissed with costs.

RIGBY L.J. In my opinion s. 70 was not intended to entrap the Court into dealing with property with which it had no idea that it was dealing. I think it is perfectly clear that in the present case the Court had no idea when it made the order for sale that it was dealing with the property of Mary Jones.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *Richard White, for D. Seline, Swansea; Riddell, Vaizey & Smith, for J. L. Howell, Swansea.*

W. L. C.

C. A.
1900
Feb. 14.

MILBANK *v.* MILBANK.

[1899 M. 1639.]

Practice — Particulars—Discovery—Production—Inspection—Privilege—Rules of Supreme Court, Order XIX., *rr.* 6, 7; *Order* XXXI., *rr.* 15, 19A (2).

A defendant may be ordered to give particulars of documents referred to in his pleading, even though he has in an affidavit of documents effectually claimed for those documents privilege from production.

The right to particulars and the right to production are distinct and independent rights.

The plaintiff claimed a declaration that she was entitled (subject to incumbrances) in fee simple to an estate of which the defendant was in possession, and her title to which he denied.

By his defence the defendant said (paragraph 3) that the mortgagees had, in the valid exercise of their statutory power of sale, sold and conveyed the estate to him for valuable consideration, and that he purchased the same in good faith and without notice of any claim which the plaintiff might have had to the estate in priority to the title of the mortgagees, and the defendant relied on his title as such bonâ fide purchaser, and he said (paragraph 4) that he had remortgaged the property so purchased by him to the same mortgagees, and that the action could not be maintained in their absence.

The defendant made an affidavit of documents by which he sufficiently claimed protection from production for a bundle of documents which included the deeds by which the transactions referred to in paragraphs 3 and 4 of the defence had been carried out:—

Held, that, notwithstanding this claim to protection, the defendant must give particulars of those transactions—namely, the date of the sale and conveyance to him by the mortgagees, and what was the valuable consideration for the same; the date of the remortgage by him, and for how much it was given.

Decision of Kekewich J. reversed.

APPEAL against a decision of Kekewich J.

The plaintiff was the widow of W. H. Vane Milbank, who was the eldest son of Sir Frederick A. Milbank, Bart. The plaintiff's husband died on October 24, 1892, without male issue, having by his will devised all his estate and property whatsoever to the plaintiff, and appointed her his sole executrix.

Sir Frederick A. Milbank died on April 28, 1898, and thereupon his second son, the first defendant, Sir Powlett J. C.

Milbank, succeeded to the baronetcy. Sir Frederick appointed Sir Powlett and the defendant Ralph Dalyell his executors.

An estate called the Thorp estate had stood limited (subject to incumbrances) to the use of Sir F. Milbank for life, with remainder to the use of W. H. Vane Milbank in tail male, with remainder to the use of the defendant Sir Powlett Milbank for life, with remainder to the use of his first and other sons successively in tail male, with remainders over.

The plaintiff alleged that the estate tail of W. H. Vane Milbank was converted by him into a base fee, and that the base fee had been afterwards enlarged into a fee simple, to which she had become entitled (subject to the incumbrances) under her husband's will.

The defendants to the action were Sir Powlett Milbank, Ralph Dalyell, and the eldest son of Sir Powlett, who was an infant.

The plaintiff claimed (inter alia) a declaration that W. H. Vane Milbank was at the time of his decease entitled to the Thorp estate for an estate in fee simple in remainder expectant on the death of Sir F. Milbank (subject to incumbrances), and that the plaintiff was now entitled under and by virtue of a deed of May 18, 1887, and the will of W. H. Vane Milbank, to the Thorp estate in fee simple, subject as aforesaid.

By their defence the defendants said (1.) that the defendant Sir Powlett was in possession of the Thorp estate by himself or his tenants; (2.) that the Thorp estate was mortgaged, as in the statement of claim mentioned, to the trustees of the Eagle Life Assurance Company, and that further mortgages to those trustees were also subsequently created on the same estate; (3.) "the mortgagees have in the valid exercise of their statutory power of sale sold and conveyed the Thorp estate to the defendant Sir Powlett Milbank for valuable consideration, and the said Sir Powlett Milbank purchased the same in good faith and without notice of any claim which W. H. Vane Milbank, or the plaintiff as claiming through him, may have had to the Thorp estate in priority to the title of the mortgagees, and the said defendant relies on his title as such bonâ fide purchaser"; (4.) "the defendant Sir Powlett Milbank has

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remortgaged all the property so purchased by him as aforesaid to trustees on behalf of the said Eagle Assurance Company, and this action cannot be maintained in the absence of such mortgagees." The defendants also alleged that the base fee of W. H. Vane Milbank had not been enlarged into a fee simple.

The defendant Sir Powlett made an affidavit of documents in which he claimed privilege from production for documents numbered 1 to 21 inclusive, contained in a bundle marked with the letter A and initialled by him and mentioned in Part II. of a schedule to the affidavit, on the ground that those documents "relate solely to the defendants' case and not to the case of the plaintiff, nor do they tend to support it, and they do not, to the best of my knowledge, information, and belief, contain anything impeaching the case of the defendants."

The plaintiff applied in chambers for directions that the defendant Sir Powlett should within seven days deliver to the plaintiff particulars of "(1.) the sale and conveyance alleged in paragraph 3 of the defence, stating when such sale and conveyance were executed and what was the valuable consideration for the same; (2.) the mortgage alleged in paragraph 4 of the defence, stating when the same was executed and for how much."

The plaintiff also applied in chambers for directions that the defendant Sir Powlett should be ordered to file within ten days a further and better affidavit of documents, "and in particular that he do set out in such affidavit full and sufficient particulars of the documents numbered 1 to 21 inclusive, contained in a bundle marked with the letter A mentioned in Part II. of the schedule to his affidavit of documents, and in respect of which the defendant claims privilege. And, further, that all such documents and all other documents (if any) in the possession or power of the said defendant which relate directly or indirectly to the alleged purchase and mortgage transactions pleaded by the said defendant in paragraphs 2 to 5 inclusive of his defence may be ordered to be produced for the inspection of the plaintiff or her solicitors."

The two applications were adjourned into court and were heard together. The defendant's counsel stated that the docu-

ments referred to in paragraphs 3 and 4 of the defence were included in the bundle of documents marked A and mentioned in Part II. of the schedule to the affidavit of documents. Kekewich J. dismissed both applications. The above statement of counsel was embodied in the order.

Kekewich J. said that the decision of the Court of Appeal in *Taylor* v. *Batten* (1) shewed that the affidavit of documents had sufficiently claimed the privilege asserted, and he held that, if the plaintiff was not entitled to discovery, she could not obtain any information about the documents by means of particulars.

The plaintiff appealed, asking by her notice of appeal that the order, so far as it refused to order the defendant to give the plaintiff particulars and to allow the plaintiff inspection, might be set aside, and that the defendant might be ordered to give particulars of the alleged sale and conveyance and remortgage, and inspection of the documents effecting the same.

Warrington, Q.C., *Marcy*, and *Buckmaster*, for the plaintiff. There may be a question whether the alleged exercise of the power of sale by the mortgagees and the alleged remortgage were bonâ fide transactions, and the plaintiff desires to have particulars of those transactions in order that she may be able if necessary to impeach them. Under rules 6 and 7 of Order XIX. (2) the plaintiff is entitled to particulars.

(1) (1878) 4 Q. B. D. 85.

(2) By Order XIX., r. 6, "In all cases in which the party pleading relies on any misrepresentation, fraud, breach of trust, wilful default, or undue influence, and in all other cases in which particulars may be necessary beyond such as are exemplified in the forms aforesaid, particulars (with dates and items if necessary) shall be stated in the pleading; provided that, if the particulars be of debt, expenses or damages, and exceed three folios, the fact must be so stated, with a reference to full particulars already delivered or to be delivered with the pleading."

Rule 7: "A further and better statement of the nature of the claim or defence, or further and better particulars of any matter stated in any pleading, notice, or written proceeding requiring particulars, may in all cases be ordered, upon such terms, as to costs and otherwise, as may be just."

By Order XXXI., r. 15, "Every party to a cause or matter shall be entitled, at any time, by notice in writing, to give notice to any other party, in whose pleadings or affidavits reference is made to any document, to produce such document for the inspection of the party giving such notice, or of his solicitor, and to permit him or them

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When the defendant sets up an independent transaction which he says defeats the plaintiff's claim, the plaintiff is entitled to particulars of that transaction so that she may be able to meet it. The plaintiff is entitled to know the date of the alleged sale by the mortgagees and the consideration given for it; the date of the alleged remortgage by the defendant and the amount for which it was given, especially having regard to the fact that the remortgage was made to the original mortgagees. It was said, and so Kekewich J. held, that the claim to privilege from production being valid, as is shewn by *Ind, Coope & Co.* v. *Emmerson* (1), the plaintiff cannot by means of particulars obtain information about the documents. But, if under the rules the plaintiff is entitled to particulars, her right cannot be defeated by means of an affidavit of documents and a claim of privilege. The right to discovery and the right to particulars are distinct and independent rights. The plaintiff must be entitled to particulars of a transaction which is alleged to defeat her title. If in an action for debt the defendant pleaded payment, the plaintiff would be entitled to particulars of the payment. So, too, if a defendant alleged that a release by a third party had defeated the plaintiff's claim under a deed, the plaintiff would be entitled to particulars of the release. The plaintiff must plead to the transactions set up by the defendant, and she cannot do so unless she has particulars of them. The documents on which the defendant relies might be forged, or the whole transaction might be a sham. On the other hand, if the plaintiff had particulars, she might elect to

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to take copies thereof; and any party not complying with such notice shall not afterwards be at liberty to put any such document in evidence on his behalf in such cause or matter, unless he shall satisfy the Court or a judge that such document relates only to his own title, he being a defendant to the cause or matter, or that he had some other cause or excuse which the Court or judge shall deem sufficient for not complying with such notice, in which case the Court or judge may allow the same to be put in evidence on such terms as to costs and otherwise as the Court or judge shall think fit."

Rule 19A (2.): "Where on an application for an order for inspection privilege is claimed for any document, it shall be lawful for the Court or a judge to inspect the document for the purpose of deciding as to the validity of the claim of privilege."

(1) (1886) 33 Ch. D. 323; (1887) 12 App. Cas. 300.

abandon her action. Suppose the defendant had set up an agreement instead of a deed: it has always been the practice to order full particulars of an agreement to be given. The defendant relied upon *Taylor* v. *Batten* (1), and he has followed the rule there laid down as to the identification of the documents for which he claims privilege. But in that case the Court recognised that a plaintiff is entitled to proper discovery of that which would take away his title. In *Ind, Coope & Co.* v. *Emmerson* (2) the Court held, no doubt, that a plea of purchase for value without notice would not protect a defendant from giving discovery. But the exact question now raised was not raised in either of the cases cited.

Particulars are really a question of precision in pleading.

[VAUGHAN WILLIAMS L.J. Under rule 15 of Order XXXI. a party may demand inspection of any document referred to in his opponent's pleading.]

The defendant has not pleaded with sufficient particularity the documents on which he relies. The plaintiff does not know the case which she has to meet. At present no question arises directly under rule 15 of Order XXXI., though it may be that, when particulars of the deeds are given, the plaintiff will be entitled to inspection.

As to the claim of privilege in the affidavit of documents, the documents of which particulars are asked are not in any way identified in the schedule. There is nothing there to shew that they are included in the bundle marked A, though the statement of counsel that they are so included is embodied in the order under appeal.

[LINDLEY M.R. referred to *Attorney-General* v. *Emerson*. (3) Apart from that statement of counsel, I should have thought that the defendant's affidavit was insufficient.]

That case shews that the plaintiff is entitled to know the nature of the documents on which the defendant relies.

Warmington, Q.C., and *John Henderson*, for the defendant. The plaintiff applied (1.) for a further and better affidavit of documents; (2.) for particulars. The first application was dismissed, and there is no appeal. The appeal is against part

(1) 4 Q. B. D. 85. (2) 33 Ch. D. 323; 12 App. Cas. 300.
(3) (1882) 10 Q. B. D. 191.

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only of the order. The question is really one of privilege. No authority has been cited for the production or the giving particulars of documents as to which a party has sworn that they relate only to his own title and do not tend to support his opponent's title. The defendant's affidavit is absolutely correct according to *Taylor* v. *Batten* (1) and *Ind, Coope & Co.* v. *Emmerson.* (2) *Attorney-General* v. *Emerson* (3) is distinguishable. In that case the Court thought that the defendant's answers to interrogatories shewed that the documents for which privilege was claimed did or might assist the plaintiff's case. The Court did not believe the defendant's affidavit. There is no authority for compelling the production of a document which shews that the plaintiff has no case. This action is not brought for the purpose of getting rid of the documents upon which the defendant relies. They are protected by *Taylor* v. *Batten* (1), which has been recognised and followed in subsequent cases: *Bewicke* v. *Graham* (4); *Morris* v. *Edwards* (5): *Budden* v. *Wilkinson.* (6) The privilege claimed extends to every mode in which production is sought. It can be claimed under rule 15 of Order XXXI.: *Roberts* v. *Oppenheim.* (7) The plaintiff is in substance asking to see the contents of the defendant's documents; after the defendant's claim of privilege she is not entitled to do that directly or indirectly. Nothing should be done to impair this privilege when it has been properly claimed. The Court ought not even, under rule 19A (2.) of Order XXXI., to look at the documents when the claim of privilege is not even attacked. A party cannot be called upon to produce a document which destroys his opponent's case. The privilege would extend even to production at the trial. The plaintiff cannot under the guise of particulars obtain that which she cannot obtain directly by an order for production.

Buckmaster, in reply.

LINDLEY M.R. I do not think there is any real difficulty in this case.

(1) 4 Q. B. D. 85.
(2) 33 Ch. D. 323; 12 App. Cas. 300.
(3) 10 Q. B. D. 191.
(4) (1881) 7 Q. B. D. 400.
(5) (1890) 15 App. Cas. 309.
(6) [1893] 2 Q. B. 432.
(7) (1884) 26 Ch. D. 724.

The application before us is twofold, and it is necessary to distinguish the one branch of it from the other. The appeal is from an order of Kekewich J. refusing particulars and refusing inspection.

I will deal first with the particulars. The plaintiff is claiming an estate to which the defendants say she is not entitled and they are. They say in their defence (paragraph 3) that some mortgagees, whose mortgage was created in 1883 and is in no way disputed, have, in the valid exercise of their statutory power of sale, sold and conveyed the estate to the first defendant. That is the substance of it. The plaintiff says, "I want particulars of that transaction." I cannot conceive what answer there is to this demand. I cannot conceive that this is such a plea as the defendants ought to be allowed to maintain without giving particulars. I agree that the plaintiff might have taken out a summons to strike out the plea as embarrassing. But the plaintiff need not do that, and she did not wish to do it. She wants particulars of the transaction which is referred to. Notwithstanding the ingenious arguments we have heard about production, I cannot see that they have any relevancy upon the question what particulars of the transaction the defendant ought to give if his pleading is such as to be technically irregular and insufficient. On that short ground it appears to me that the plaintiff is entitled to particulars of the transaction. It does not follow that, because the transaction is embodied in a deed, the plaintiff is not entitled to particulars of it. She is not asking for a copy of the deed or for its contents. It is an entirely false point to say, "Because I am not bound to produce a deed, I am not bound to answer any question relating to the transaction which is embodied in the deed." The two things are totally different.

With regard to inspection there is a greater difficulty, and, as the authorities now stand, I am not prepared to say that a defendant cannot claim privilege for a number of deeds which are simply described as a bundle of documents marked so and so. I think we have gradually slid into a lax practice about that, because by allowing affidavits of documents to be made in that form and holding them sufficient, a party may render it

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utterly impossible for any one to test whether the documents in the bundle do or do not relate to his own case exclusively. I think there is great danger of persons being able to obtain protection for documents which are not really entitled to protection by having recourse to this form of affidavit, which is comparatively modern. The right to put documents into bundles was a concession to prevent what was very often a grievous oppression in compelling defendants to set out a long list of documents which no one cared anything about. But, on the other hand, I think the Court has been a little lax in opening the door to defendants to obtain protection for documents for which, if they described them properly, they might not be entitled to protection. But, as the decisions stand, I am not prepared to say that this affidavit, now that it has been supplemented by the statement of counsel which is embodied in the order, is not technically sufficient. Without that statement, it was obviously insufficient and for this reason. The pleadings shew that the defendant must have deeds in his possession relating to the matters in question which he does not disclose at all. That made the affidavit obviously wrong; but that defect has been cured to this extent—that it is now to be treated by us, as it was treated by the Court below, as if it had stated that the bundle of documents contained the deeds relating to the transaction of sale and remortgage.

Having regard to the authorities, beginning with *Taylor* v. *Batten* (1), which was followed in *Morris* v. *Edwards* (2) and *Budden* v. *Wilkinson* (3), I am not prepared to say that these documents are not protected. I think they are. Therefore, we must allow the appeal as regards the particulars, and dismiss it as regards inspection.

And, inasmuch as the plaintiff has been partly right and partly wrong, and the real struggle has been about inspection, I think the costs in both Courts ought to be costs in the action.

RIGBY L.J. I agree.

VAUGHAN WILLIAMS L.J. I also agree. But I wish to make two observations. The first is, that we are making the order

(1) 4 Q. B. D. 85. (2) 15 App. Cas. 309. (3) [1893] 2 Q. B. 432.

for particulars because the allegations in paragraph 3 of the defence are too general. If the facts relied upon in paragraph 3 had been properly pleaded they would have been pleaded with much more particularity. There has been a great deal of discussion about particulars. At different times in the history of proceedings at law and in equity particulars have been allowed for different reasons. Sometimes particulars have been allowed in order that there might not be a surprise at the trial. Sometimes they have been allowed as limitations of the claim, whether of the plaintiff or of the defendant, to limit the extent of the evidence to be given at the trial. But under the Judicature Act particulars are allowed for quite a different purpose: they are really supplemental to the pleadings. They are in fact amendments of the pleadings, and that is what the particulars which we are ordering to be given are. I do not wish to say anything about matters which we have not to decide to-day, as, for instance, what may be the effect of rule 15 of Order XXXI. But it seems to me that the defendant will be rash if he considers that these particulars are not a pleading within the meaning of that rule, because it is really as an amendment to the pleading that we are ordering them to be given. It would not, as it seems to me, be right that the defendant, if he ought to have set out these matters in his defence, should gain any advantage or avoid any liability by his own failure to do that which he ought to have done. With regard to rule 19A of Order XXXI., I express no opinion how far the learned judge (if he had been asked to do so) could have looked at the documents in this bundle when an application was made for their production for inspection.

Solicitors: *G. M. Saunders; Burch, Whitehead & Davidsons.*

W. L. C.

C. A.
1900
STIRLING J.
Jan. 11, 17.
C. A.
Feb. 15.

STEWART *v.* RHODES.

[1899 S. 103.]

Practice—Judgment Debtor—Charging Order—Death of Judgment Debtor—Leave to issue Execution against Executor—Clerical Error—Correction—Charge on Executor's Interest—Judgments Act, 1838 (1 & 2 *Vict. c.* 110), *ss.* 14, 15—*Rules of Supreme Court, Order* XXVIII., *r.* 11; *Order* XLII., *r.* 23; *Order* XLVI., *r.* 1.

Under 1 & 2 Vict. c. 110, s. 14, there is no power after the death of a judgment debtor to make a charging order against his executor in respect of a judgment debt of the deceased, unless in some way judgment has been first obtained against the executor.

Whether such a judgment can be obtained under the present practice, *quære.*

Under s. 15 of the Act it is essential that the person who is to shew cause against the making absolute a charging order nisi should be the person against whom the judgment was recovered.

The executor of a deceased judgment debtor cannot shew cause against a charging order nisi made in respect of a judgment recovered against the deceased.

Leave given under rule 23 of Order XLII. to issue execution against the executor of a deceased judgment debtor does not operate as a judgment against the executor; it dispenses with the necessity of recovering judgment against him, and consequently does not satisfy the requirements of ss. 14 and 15 of 1 & 2 Vict. c. 110:—

So *held* by the Court of Appeal.

Haly v. *Barry*, (1868) L. R. 3 Ch. 452, and *Finney* v. *Hinde*, (1879) 4 Q. B. D. 102, commented on.

An order obtained by a judgment creditor after the death of the judgment debtor gave him liberty to issue execution against the debtor's executor, and ordered that, unless sufficient cause were shewn to the contrary, the interest of the debtor in a sum of Consols should stand charged with the amount of the judgment. Before the order was made absolute judgment was pronounced for the administration of the debtor's estate:—

Held, by Stirling J., that the order could not be treated as charging the interest of the executor, and that, having regard to the judgment for administration, the Court ought not to correct the form of the order:

Held, therefore, that the order was bad.

Decision affirmed by the C. A. on different grounds.

Observations by Stirling J. on the construction of orders of the Court.

THE question raised by this case was as to the validity of a charging order nisi made in the action.

On January 10, 1899, the plaintiffs commenced this action

in the Queen's Bench Division against John Rhodes (since deceased) to recover a debt of 959*l.* 11*s.* 9*d.* On January 30, 1899, the defendant having appeared, the plaintiffs obtained leave to sign judgment under Order XIV. for the sum claimed, with costs, which were allowed at 8*l.* 19*s.* 10*d.*

On March 27, 1899, the defendant died, and on June 9 his will was proved by Edwin Wilford, the sole acting executor.

On June 16, 1899, an action *In re Rhodes, Yorkshire Investment, &c., Co.* v. *Wilford*, was commenced in the Chancery Division by secured creditors of the deceased against the executor to enforce their security, and also for general administration of the estate of the deceased.

On the same June 16 an order was made in Lunacy, the deceased having been a person of unsound mind not so found by inquisition, with respect to a sum of 743*l.* 8*s.* 7*d.* New Consols standing in court to his credit. The order directed the sale of sufficient New Consols to provide for certain costs thereby ordered to be taxed, and also for the payment of a sum of 199*l.* 10*s.* to the widow of the deceased, and ordered the residue to be transferred to the executor.

On June 17, 1899, the plaintiffs in the present action obtained from the master an order which, after a recital of the indebtedness of the defendant under the judgment of January 30, 1899, and that there was "standing to the ledger credit of the said John Rhodes, the judgment debtor, a person of unsound mind not so found by inquisition, in the books of the Supreme Court Pay Office, Royal Courts of Justice, the sum of 743*l.* 8*s.* 7*d.* New Consols," continued as follows: "It is ordered that the plaintiffs be at liberty to issue execution against Edwin Wilford of Birstall, in the county of York, the executor of the above-named defendant, under Order XLII., r. 23; and it is ordered that, unless sufficient cause be shewn to the contrary before the Judge in Chambers, Central Office, Royal Courts of Justice, Strand, London, on Wednesday the 28th day of June, 1399, at 11 of the clock forenoon, the defendant's interest in the said sum of New Consols so standing as aforesaid shall, and that it in the meantime do, stand charged with the payment of the above-mentioned amounts due on the said judgment."

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On June 22, 1899, judgment was pronounced in the action *In re Rhodes, Yorkshire Investment, &c., Co.* v. *Wilford* for the administration of the deceased's estate.

On June 26, 1899, an order was made to transfer the Queen's Bench action to the Chancery Division.

On June 28, 1899, the plaintiffs applied to make the charging order of June 17 absolute. Affidavits were filed by several witnesses in opposition to this application, and on July 12 the plaintiffs took out a summons for leave to cross-examine these witnesses upon their affidavits. Upon the hearing of this summons in chambers a preliminary objection was taken to the validity of the order of June 17, and it was agreed, with a view to save expense, that the matter should be adjourned into court in order that this question might be argued. The summons came on for hearing before Stirling J. on January 11, 1900.

Jenkins, Q.C. (*Whinney* with him), for the summons. The order of June 17 gives leave to the plaintiffs to issue execution under Order XLII., r. 23, against the defendant's executor, and charges the defendant's interest in the sum of Consols with the amount due on the judgment. "The defendant's interest" means such interest as had become vested in his legal personal representative. It may be said that the interest of the judgment debtor cannot be charged under 1 & 2 Vict. c. 110, s. 14, after his death, and *Finney* v. *Hinde* (1) will be relied upon; but that case is distinguishable, because there the judgment creditor had not obtained leave to issue execution against the legal personal representative of the judgment debtor. The effect of obtaining that leave is that the legal personal representative takes the place of the debtor, and a charging order may be made against him: *Haly* v. *Barry*. (2) In substance the order in this case is the same as that made in *Haly* v. *Barry*. (2) The only difference is that there the charge was on the interest of the defendant or his executor; but the Court will not declare this order invalid upon a mere formal technicality, and if necessary the form of the order can be corrected

(1) 4 Q. B. D. 102. (2) L. R. 3 Ch. 452.

under Order XXVIII., r. 11. *Finney* v. *Hinde* (1) does not go the length of deciding that under no circumstances can a creditor obtain execution against the interest of a deceased debtor in respect of his choses in action.

Further, independently of 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, the plaintiffs are entitled to a charging order upon the principle of *Brereton* v. *Edwards*. (2)

The Lunacy proceedings may affect the operation of the order, but do not affect the question of jurisdiction so long as there is some interest remaining in the executor.

Harman (*Micklem, Q.C.*, with him), for the executor. Under 1 & 2 Vict. c. 110, and 3 & 4 Vict. c. 82, a charging order operates as a charge given by the debtor. The statutes say nothing about executors. Having regard to the death of the debtor and the Lunacy proceedings, no charging order could be obtained in this case: *Dixon* v. *Wrench* (3); *Gill* v. *Continental Union Gas Co.* (4); *In re Leavesley*. (5)

The case is governed by *Finney* v. *Hinde* (1), and is distinguishable from *Haly* v. *Barry*. (6)

The order is in a wrong form and it is too late to alter it, because judgment has been given for the administration of the debtor's estate.

In *Brereton* v. *Edwards* (2) the judgment debtor was living, and the question now in dispute was not discussed.

E. S. Ford (*Upjohn, Q.C.*, with him), for the Yorkshire Investment Company. 1. The order is wrong in form, and it would be inequitable to alter it. It is not the practice of courts of equity to interfere with the regular course of administration by assisting one creditor to obtain a priority over another: *Wallace* v. *M'Cann*. (7)

2. No charging order can be made after the death of the judgment debtor. This is clearly shewn by the reasoning of Cockburn C.J. in *Finney* v. *Hinde*. (1)

Jenkins, Q.C., in reply.

Cur. adv. vult.

(1) 4 Q. B. D. 102.
(2) (1888) 21 Q. B. D. 226; on appeal, 488.
(3) (1869) L. R. 4 Ex. 154.
(4) (1872) L. R. 7 Ex. 332.
(5) [1891] 2 Ch. 1.
(6) L. R. 3 Ch. 452.
(7) (1842) 4 Ir. Eq. Rep. 522.

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Jan. 17. STIRLING J. (after stating the facts). The objection which is taken to the charging order is that there is no power under the statutes to make an order after the death of the defendant charging his interest with this debt, and on this point I have to pay regard to two cases, both of which are binding on me—namely, *Haly* v. *Barry* (1), a decision of the Court of Appeal, and *Finney* v. *Hinde* (2), a decision of a Divisional Court. I shall deal with them in order of date. The first case, *Haly* v. *Barry* (1), arose in this way. A creditor recovered judgment against his debtor and issued a fi. fa. Shortly afterwards the debtor died. The creditor entered a suggestion on the record entitling him to have execution against the executrix, and obtained a charging order nisi upon shares belonging to the debtor. After the order nisi had been obtained, but on the same day, a decree was made for the administration of the debtor's estate. The order not having been made absolute, the plaintiff in the administration suit applied for an injunction to restrain further proceedings by the judgment creditor, and it was held that the injunction ought not to be granted. What happened in regard to the charging order in that case was this—that on February 6, 1868, an order was made in the action to enter a suggestion on the record of the death of the defendant Barry and of the appointment of his wife as his executrix. This suggestion was on the following day entered on the record, to the effect that the plaintiff was entitled to have execution of the judgment against Mrs. Barry as executrix. On the same day the plaintiff applied for an order to charge 1600 shares belonging to Barry in the Upper Assam Tea Company. The material part of the order was as follows: "I do order that unless cause be shewn before me or before such other judge as shall be in attendance at my chambers in Rolls Gardens, within one month from the date hereof, all interest which the defendant herein, or Mary T. Barry, his sole executrix, has in 1600 shares now standing in the books of the Upper Assam Tea Company, Limited, in the name of the said G. R. Barry, be charged with the sum of 2108*l.*, being the amount of a certain judgment recovered

(1) L. R. 3 Ch. 452. (2) 4 Q. B. D. 102.

herein on the 29th of November, 1866, by the above-named plaintiff against the above-named defendant."

In order to appreciate the effect of that we must look at the Common Law Procedure Act, 1852 (15 & 16 Vict. c. 76). [His Lordship referred to ss. 129 and 130, and to form 8 in Sched. A (1).] The result is that the plaintiff is to have execution against the defendant's legal personal representative as such. The question of the validity of the order nisi does not appear to have been much argued in *Haly* v. *Barry* (2); but certainly there are expressions of opinion in the judgments of the Lords Justices which seem to me to shew that they regarded the order as valid, and that they so held.

The other case is *Finney* v. *Hinde*. (3) There, at the date when the order nisi was obtained, the judgment debtor was dead, and cause was shewn on behalf of his widow, the executrix of his will, but a caveat was entered against the proof of the will. It was objected that, as in the case of an

(1) These sections provided as follows:—

Sect. 129: "In cases where it shall become necessary to revive a judgment by reason . . . . of a change, by death or otherwise, of the parties entitled or liable to execution, the party alleging himself to be entitled to execution may . . . . apply to the Court or a judge for leave to enter a suggestion upon the roll, to the effect that it manifestly appears to the Court that such party is entitled to have execution of the judgment and to issue execution thereupon . . . ."

[The section then provided for the form of the application.]

Sect. 130: "Upon such application, in case it manifestly appears that the party making the same is entitled to execution, the Court or judge shall allow such suggestion as aforesaid to be entered in the form contained in the schedule (A) to this Act annexed, marked No. 8, or to the like effect, and execution to issue thereupon . . . ."

The form above referred to was as follows:—

"And now on the ——— day of ——— it is suggested and manifestly appears to the Court, that the said A.B. [or C.D., as executor of the last will and testament of the said A.B. deceased, *or as the case may be*,] is entitled to have execution of the judgment aforesaid against the said E.F. [or against G.H., as executor of the last will and testament of the said E.F., *or as the case may be*]: Therefore it is considered by the Court that the said A.B. [or C.D., as such executor as aforesaid, *or as the case may be*,] ought to have execution of the said judgment against the said E.F. [or against G.H., as such executor as aforesaid, *or as the case may be*]."

[These enactments were repealed by the Statute Law Revision and Civil Procedure Act, 1883 (46 & 47 Vict. c. 49), s. 3.]

(2) L. R. 3 Ch. 452.

(3) 4 Q. B. D. 102.

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ordinary execution by fieri facias, it would be necessary upon the death of the judgment debtor, in order to obtain execution, to apply for leave to enter a suggestion on the roll according to the Common Law Procedure Act, 1852, s. 129, and that a charging order could not be made absolute until such a suggestion had been entered in the action, or until the plaintiff had applied under Order XLII. for leave to issue execution against the defendant's representative; but Field J. thought that, as the defendant's representative had appeared to shew cause, it was unnecessary to apply for leave to proceed against her, and he made the order absolute. Then there was an appeal to the Divisional Court, and the argument on behalf of the executrix was that the Act 1 & 2 Vict. c. 110, ss. 14, 15, gave no power to make the order. In opposition to that *Haly* v. *Barry* (1) was relied on. The Court, consisting of Cockburn C.J. and Pollock B., allowed the appeal. Cockburn C.J. put the matter thus (2): "The Act 1 & 2 Vict. c. 110, was passed for the abolition of arrest on mesne process, and also to introduce further provisions for facilitating the execution of judgments. It would be intended that these remedies should be coextensive with that which they replaced, and the power of arrest was of course coextensive with the life of the debtor. In the present case the judgment debtor was dead when the order nisi was obtained, and, inasmuch as the section only allows the judge to make the order absolute after hearing what the judgment debtor has to say against it, there was a fatal obstacle to the further progress of the order." Pollock B. says: "Sects. 14 and 15 enable a charging order to be made ex parte; and this order is to be made absolute, unless the judgment debtor shews sufficient cause to the contrary. It is quite clear that what is meant is that the judgment debtor shall himself shew cause. If the order could be made absolute after his death it would almost always be made absolute without the inquiry contemplated by the Act. As to the argument that as the representative appeared the case ought to go on, the answer is that the charging order is not a step in an action, but a new and substantive proceeding in the nature of an execution."

(1) L. R. 3 Ch. 452. (2) 4 Q. B. D. 103.

That shews that where a proceeding has not been taken equivalent to the application to enter a suggestion on the record as provided by the Common Law Procedure Act, 1852, a charging order cannot be made after the death of the judgment debtor. I am bound by both these cases, and I must reconcile them if I can. The only view, as it seems to me, in which they can be reconciled is this. The effect of them is that there is no power after the death of the original judgment debtor to make a charging order on his interest, but that there is power to make a charging order on the interest of the executor after an order giving liberty to issue execution against the executor has been made. I take it that in the latter case the executor becomes the judgment debtor within the meaning of 1 & 2 Vict. c. 110, s. 14. In the present case what has been done? It is ordered that the plaintiffs be at liberty to issue execution against the executor of the defendant; but the order continues that "the defendant's interest in the said sum of New Consols" shall stand charged with the payment of the amount due under the judgment. The charge is created not on the interest of the executor, as was the form in *Haly* v. *Barry* (1), but on the interest of the defendant. It seems to me plain upon the construction of the order that by the defendant is meant John Rhodes, and indeed he is treated in the order not only as defendant, but as judgment debtor, because the recital is that there is standing to the credit of the "said John Rhodes, the judgment debtor, a person of unsound mind not so found by inquisition," the sum, &c. Is that a valid order? It seems to me, upon the authority of *Finney* v. *Hinde* (2), that it is not. There is no power to charge the interest of the defendant after his death, and in point of fact his interest at the time of his death had ceased to be such by the order in Lunacy of the preceding day.

It is said that this charging order ought to be construed liberally, and that I ought to say that "the defendant's interest" means such interest as is now vested in his legal personal representative. But the rules applicable to the construction of wills and other similar instruments are not applicable to the

(1) L. R. 3 Ch. 452. (2) 4 Q. B. D. 102.

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construction of orders of the Court, which are formal documents, and must be taken to have the legal meaning properly attributable to them. That is a proposition which has been acted upon in many cases. In particular, I remember a case of *Freke* v. *Carbery* (1), which is not reported upon the point for which I am citing it. In that case the right of a tenant for life to cut timber was considered, and the matter came before Lord Selborne, who was sitting for the Master of the Rolls (Lord Romilly). He made a declaration that the tenant for life was not entitled to cut timber. Afterwards the question arose whether the tenant for life was entitled to cut timber for the purpose of repairs, which is the ordinary right of a tenant for life. The question came before Sir G. Jessel M.R., who held that he was bound by the form of the previous order, though it was plainly a slip, and that the tenant for life had no right to cut timber for any purpose. The matter was then taken to the Court of Appeal, and the decision of Jessel M.R. was affirmed. Therefore I cannot hold on this order that by the interest of the defendant is meant the interest which has become vested in the executor.

Then it is said that this is a slip which ought to be put right. It is very probable, or at least it is possible, that, if the attention of the master who made this order had been drawn to the point, the order would have been made in the same form as the order in *Haly* v. *Barry*. (2) But it was not. Now rule 11 of Order XXVIII. empowers the Court to correct "clerical mistakes in judgments or orders, or errors arising therein from any accidental slip or omission." The effect of that rule has been considered by the House of Lords in *Hatton* v. *Harris* (3), where the power was exercised. Lord Watson states in a sentence the effect of it. He says: "When an error of that kind has been committed, it is always within the competency of the Court, if nothing has intervened which would render it inexpedient or inequitable to do so, to correct the record in order to bring it into harmony with the order which the judge obviously meant to pronounce. The correction ought to be

(1) Unreported. (2) L. R. 3 Ch. 452.
(3) [1892] A. C. 547, 560.

made upon motion to that effect, and is not matter either for appeal or for rehearing." No motion has been made to that effect here; but I think that I ought to express my opinion, so far as I can upon the materials before me, as to what would be the result of such an application. It seems to me that this case falls within the exception mentioned by Lord Watson, and that something has happened which would render it inequitable to correct this order, because on June 22 judgment for the administration of the debtor's estate was pronounced, and the effect of that is to give the general creditors the right to have the property of the deceased applied in payment of their debts pari passu. I think, therefore, that this order is bad.

H. B. H.

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The plaintiffs appealed. The appeal was heard on February 15, 1900.

C. A.

Jenkins, Q.C., and *Whinney*, for the plaintiffs. The order of June 16 in Lunacy was not known to the plaintiffs when they obtained the order of June 17. Order XLII., r. 23 (1),

(1) By 1 & 2 Vict. c. 110, s. 14, "If any person against whom any judgment shall have been entered up in any of Her Majesty's superior Courts at Westminster shall have any Government stock, funds, or annuities, or any stock or shares of or in any public company in England (whether incorporated or not), standing in his name in his own right, or in the name of any person in trust for him, it shall be lawful for a judge of one of the superior Courts, on the application of any judgment creditor, to order that such stock, funds, annuities, or shares, or such of them or such part thereof respectively as he shall think fit, shall stand charged with the payment of the amount for which judgment shall have been so recovered, and interest thereon; and such order shall entitle the judgment creditor to all such remedies as he would have been entitled to if such charge had been made in his favour by the judgment debtor; provided that no proceedings shall be taken to have the benefit of such charge until after the expiration of six calendar months from the date of such order."

Sect. 15: "Every order of a judge charging any Government stock, funds, or annuities, or any stock or shares in any public company, under this Act, shall be made in the first instance ex parte, and without any notice to the judgment debtor, and shall be an order to shew cause only . . . . and no disposition of the judgment debtor in the meantime shall be valid or effectual as against the judgment creditor; and further, unless the judgment debtor shall within a time to be mentioned in such order shew to a judge of one of the said superior Courts sufficient cause to the contrary, the said order shall, after proof of

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of the Rules of the Supreme Court has taken the place of the old procedure under ss. 129, 130 of the Common Law Procedure Act, 1852, and of the procedure against an executor by scire facias. The effect of an order under that rule, giving leave to issue execution against an executor, is the same as if the action had been originally brought against him; it has the effect of a judgment against him, and he becomes the judgment debtor, and he is thus brought within ss. 14 and 15 of 1 & 2 Vict. c. 110. He is "the debtor" for the purpose of being heard whether the charging order nisi shall be made absolute. The present case is really governed by *Haly* v. *Barry* (1), in which the Court refused to restrain proceedings to make absolute a charging order nisi obtained after the death of a judgment debtor.

[LINDLEY M.R. There the order nisi charged the interest "of the defendant *or* his executrix."]

That is really the meaning of the order in the present case; an elliptical expression is used. It is well settled that there can be execution against an executor de bonis testatoris, but that is not a strictly accurate expression: it is elliptical, and means the goods which were the testator's but have vested in the executor. It was not even suggested in *Haly* v. *Barry* (1) that by no process could the Judgments Act be put into opera-

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notice thereof to the judgment debtor, his attorney or agent, be made absolute."

Order XLII., r. 23: "In the following cases, viz." (inter alia):

"(*a*) Where six years have elapsed since the judgment or date of the order, or any change has taken place by death or otherwise in the parties entitled or liable to execution;

the party alleging himself to be entitled to execution may apply to the Court or a judge for leave to issue execution accordingly. And such Court or judge may, if satisfied that the party so applying is entitled to issue execution, make an order to that effect, or may order that any issue or question necessary to determine the rights of the parties shall be tried in any of the ways in which any question in an action may be tried. And in either case such Court or judge may impose such terms as to costs or otherwise as shall be just."

Order XLVI., r. 1: "An order charging stock or shares may be made by any Divisional Court or by any judge, and the proceedings for obtaining such order shall be such as are directed, and the effect shall be such as is provided, by the Acts 1 & 2 Vict. c. 110, ss. 14 and 15, and 3 & 4 Vict. c. 82, s. 1."

(1) L. R. 3 Ch. 452.

tion after the death of the judgment debtor. The order may be open to verbal criticism, but that is all. Stirling J. based his decision on *Finney* v. *Hinde*. (1) The actual decision in that case was clearly right, because the judgment creditor had not obtained leave to issue execution against the executor, but it is submitted that the reasons given by the Court were wrong. The equitable interest in the stock passed on the death of Rhodes to his executor, but the interest was that of Rhodes, though the executor could deal with it. Of course, the rights of the widow under the Lunacy order took precedence. At the time when the charging order nisi was obtained the executor was really the judgment debtor; a charge given by him upon the interest of Rhodes would have been good, and by s. 14 a charging order is to have the same effect as a charge made by the judgment debtor.

[VAUGHAN WILLIAMS L.J. Ought you not to have obtained leave to issue execution against the executor before you could apply for a charging order?]

It was necessary to give notice of the application for leave to issue execution, but the charging order nisi could be made ex parte. The order giving the leave comes first. If the two orders had been on different pieces of paper no objection could have been made to them. What difference can it make that they are included in one piece of paper?—*Watts* v. *Jefferyes*. (2) In fact, the leave was given first. Though the order speaks of charging "the defendant's interest," the master when he made the order knew that the judgment debtor was dead, and that his interest had passed to his executor. The master could not have intended to make an order which must be inoperative. The question is merely as to the identification of the property to be charged. There is nothing substantially wrong in the order.

At any rate, the charging order may be supported under the general jurisdiction of the Court: *Brereton* v. *Edwards*. (3) The Court will aid a creditor in obtaining the benefit of his diligence.

(1) 4 Q. B. D. 102. (2) (1851) 3 Mac. & G. 422.
(3) 21 Q. B. D. 226, 488.

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Harman, for the executor. The appellants really want to amend the charging order. That order is based on the assumption that Rhodes is the judgment debtor. A charging order has effect only under the statute, and it is upon the interest of the debtor. A charging order has the same effect as a charge made by the debtor himself; a dead man could not give a charge, nor can he shew cause against the making an order nisi absolute. The Act 1 & 2 Vict. c. 110 ought to be construed very strictly: *Dixon* v. *Wrench* (1); *Gill* v. *Continental Union Gas Co.* (2) An order under rule 23 of Order XLII. giving leave to issue execution against an executor has not the effect of a judgment against him; he does not thereby become a "judgment debtor" within the meaning of ss. 14 and 15 of 1 & 2 Vict. c. 110. Until he has become a judgment debtor those sections cannot be put in force against him. He ought to be made a party to the action under Order XVII., r. 4. The Court will not now assist the plaintiffs to obtain priority: *Wallace* v. *M'Cann.* (3) The plaintiff has obtained a charging order which is of no value: it charges the interest of a man who has no interest. It is too late now to amend the order.

E. S. Ford, for the plaintiffs in the administration action. The Court will not assist a judgment creditor to obtain priority after the death of the debtor: *In re Cave.* (4) In *Haly* v. *Barry* (5) the order nisi had not been made absolute; the Court only refused to restrain the creditor from taking proceedings to make it absolute. And the creditor had issued and levied execution in the lifetime of the debtor, and had taken every proper step after his death. Moreover, the order nisi charged the interest of the debtor or his executrix. In *Finney* v. *Hinde* (6), as in the present case, the creditor had not taken the proper steps against the executor. The plaintiffs ought to have got the executor added as a defendant to the action before they applied for leave to issue execution against him. At any rate the leave to issue execution should have been obtained

(1) L. R. 4 Ex. 154, 158.
(2) L. R. 7 Ex. 332, 338.
(3) 4 Ir. Eq. Rep. 522.
(4) W. N. (1892) 142.
(5) L. R. 3 Ch. 452.
(6) 4 Q. B. D. 102.

before the charging order. But Cockburn C.J. was right in saying in *Finney* v. *Hinde* (1) that the remedies under ss. 14 and 15 of 1 & 2 Vict. c. 110, are coextensive with the life of the judgment debtor; he himself has to shew cause against making the charging order absolute. That decision has stood for twenty years.

[LINDLEY M.R. It does not decide that in no way can a charging order nisi be obtained against the executor of a deceased judgment debtor.]

It may not go so far as that, but at any rate the order obtained here is entirely wrong.

Jenkins, Q.C., in reply. It is submitted that leave to issue execution against an executor has the effect of making him a "judgment debtor": *Haly* v. *Barry*. (2) A person against whom you are entitled to issue execution is a "judgment debtor" within 1 & 2 Vict. c. 110. The argument on the other side comes to this, that under no circumstances after a man is dead can you under this Act enforce a judgment against stock in which he is interested. In *In re Shephard* (3) it was held that a receiver could not be appointed at the instance of a judgment creditor after the death of the debtor and in the absence of any person to represent his estate.

[LINDLEY M.R. It was not said there that the procedure under rule 23 of Order XLII. is a step towards obtaining equitable execution.]

That rule implies that leave is required to issue execution when there has been a change of the party liable to it.

[LINDLEY M.R. Is not the true view of the present procedure this, that you do not obtain judgment against the executor of a debtor who has died after judgment against him, but you dispense with the necessity of judgment and obtain leave to issue execution without a judgment? But can you dispense with a judgment in the procedure under ss. 14 and 15 of 1 & 2 Vict. c. 110?]

Under the old method of procedure by "suggestion," judgment against the executor was dispensed with.

[VAUGHAN WILLIAMS L.J. In that procedure an entry was

(1) 4 Q. B. D. 102. (2) L. R. 3 Ch. 452. (3) (1889) 43 Ch. D. 131.

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made on the record. When an application is made for leave to issue execution against the executor the old record is retained.]

The order giving leave to issue execution places the executor in the same position as if he had been originally sued. The old form of "suggestion" was in substance the same thing as an order under rule 23 of Order XLII. A charging order is a form of execution. No doubt, if *Finney* v. *Hinde* (1) was rightly decided, a charging order under 1 & 2 Vict. c. 110, cannot be obtained after the death of a judgment debtor. But it is submitted that that decision was wrong. Any order of the Court is a matter of record. If the executor is the "judgment debtor," *Finney* v. *Hinde* (1) has no application. The object of rule 23 is to enable execution to be issued against persons who are not parties to the record.

To sum up the argument—(1.) Taking the Act and the rules together, "judgment debtor" should be read as meaning a person who is entitled to levy execution. The effect of the Lunacy order here was merely to provide for the payment of costs and part maintenance of the lunatic, as to which it gave priority over the plaintiffs. But it did nothing more. (2.) If the charging order cannot be made under the Act it can be made under the general equitable jurisdiction of the Court, as was done in *Brereton* v. *Edwards*. (2) (3.) On the construction of the order and having regard to the facts, the description of the interest intended to be charged is sufficiently accurate. When the judgment was recovered, Rhodes was not the legal owner of the stock. He had a beneficial interest in it. When he died his executor became the beneficiary. By devolution of law the executor now represents the interest of Rhodes. The interest of the executor may not improperly be called the interest of the dead man.

LINDLEY M.R. This appeal raises a small point of practice, but though small it is very important. The discussion has taken a long time, but, now that the matter has been threshed out, I do not think there is any real difficulty in it.

(1) 4 Q. B. D. 102. (2) 21 Q. B. D. 226, 488.

It struck us at first, and it strikes us now more forcibly than perhaps it did when we first understood the case, that no one has ever heard of such an order as this before. It is an experiment. These charging orders have been in operation ever since the beginning of the present reign, and no one as yet (except in one case to which I will refer presently) has ever obtained, or, so far as I know, has discussed the possibility of obtaining, a charging order against an executor for a debt due from his deceased testator. I do not say this cannot be done, for reasons which I will state presently; but when we recollect that the right to a charging order is statutory, and that the mode of obtaining it is also statutory, we must look to the statutes which relate to it. Order XLVI., r. 1, makes that unmistakably clear, for it does not substitute any new method of getting such an order, and does not increase the number of cases in which it can be obtained. [His Lordship read rule 1, and continued:—]

Therefore we are thrown by that rule upon those statutes, both for the procedure for obtaining a charging order and for the effect of it when obtained.

Let us look, then, at the statutes. The important one is 1 & 2 Vict. c. 110, s. 14. [His Lordship read s. 14, and continued:—]

This section shews that it is necessary for the application of the Act and for obtaining of a charging order to have a person against whom a judgment has been entered, and the procedure shews that that person is the "judgment debtor," who must be in a position to shew cause why the charging order should not be made absolute. In other words, he must be alive. And it was settled long ago in *Finney* v. *Hinde* (1) that a charging order nisi against a dead man was useless, and that it could not be converted into an order absolute. That is really all that *Finney* v. *Hinde* (1) decided. That led to this possible result, that a creditor who had recovered a judgment for his debt against a dead man must, if he wished to have a charging order against his executor, obtain a judgment against the executor and thus make him a "judgment debtor." This

(1) 4 Q. B. D. 102.

C. A. 1900 STEWART v. RHODES. Lindley M.R.

could be done under the old practice. Then, when the creditor had got a judgment against the executor, the executor would be a "judgment debtor" within 1 & 2 Vict. c. 110, and the procedure under that Act would be applicable.

The objection to this experiment is that it is an attempt to obtain a charging order against an executor without first making him a "judgment debtor." But it is said that the plaintiffs have done that which by the modern practice is equivalent to a judgment. Is it so? Let us look a little further. The order relied on by the appellants as providing a procedure equivalent to obtaining judgment is Order XLII., r. 23. I agree that for most purposes if you have a judgment against a deceased man you need not bring an action on that judgment and recover another judgment against his executor; you can under that rule obtain leave to issue execution against the executor. There are two possible views of that rule. The one is that which has been urged by the appellants, that an order giving leave to issue execution is equivalent to a judgment. The other view is that an order giving leave to issue execution dispenses with the necessity of a judgment. In my opinion, the latter is the true view. The rule does not say, and it does not mean, that the plaintiff is to be treated as if he had got a judgment against the executor, but that, although he has no judgment against the executor, he need not obtain one, because he may issue execution against the executor without it. Consider the differences, which are no doubt technical. It is plain that leave to issue execution under Order XLII., r. 23, does not operate by way of merger of any cause of action, or anything of that sort. It does not convert the creditor into a specialty creditor: it has not the effect of a judgment. The true explanation of the rule is that you need not obtain judgment, because in ninety-nine cases out of a hundred there is no necessity for it, and you may issue execution without it. If that is the true view of the rule, this order nisi is wholly wrong, because the plaintiffs have not complied with the essential condition of 1 & 2 Vict. c. 110, by obtaining judgment against the executor.

But Mr. Jenkins says that, having recovered judgment

against the dead man, he cannot get another judgment de bonis testatoris against the executor for the same debt. What does that come to? If the creditor cannot do that it follows that he cannot get a charging order at all. But if he cannot, why is it? There were formerly proceedings on judgments against executors by means of scire facias and otherwise, and there was no difficulty about it. If all that practice is abolished (a question which we have not yet had the opportunity of fully considering), what follows? Not that the creditor has no remedy, but that he must bring an administration action. That is the modern practice, and that explains why, from the passing of 1 & 2 Vict. c. 110, no one has ever heard of a charging order being obtained against an executor upon a judgment recovered against his testator.

The only case which throws any doubt on what I have been saying is *Haly* v. *Barry*. (1) In that case a judgment creditor had after the death of the debtor obtained an order to enter a suggestion on the record of the death and of the appointment of the executrix; and after this the creditor obtained a charging order nisi against his executrix, and on the same day at a later hour a decree was made for the administration of the debtor's estate. The old practice had been followed there, and the executor had been made a party to the action for the debt, and the Court said that was equivalent to a judgment against the executor. Whether it was or was not equivalent to a judgment under the old practice I need not consider now. Be that as it may, the decision was only that they would not interfere by injunction to prevent the order being made absolute for what it was worth. They held that if a creditor had obtained an advantage he should be allowed to retain the benefit of it. There was no ground for the injunction except to stop a race between creditors. That of itself is not a sufficient ground, because the Court would not interfere for that purpose simply because it was asked to do so.

The result is, that this order nisi was altogether wrong. No one ever saw such an order before. It is an experiment,

(1) L. R. 3 Ch. 452.

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and I hope it will not be repeated. The appeal will be dismissed with costs.

I should add that, if we had power under our general jurisdiction to make a charging order, this is not a case in which we should think of exercising it.

RIGBY L.J. I am of the same opinion. Whether a judgment can or cannot be obtained against an executor in such a case, it appears to me that it must be obtained before a charging order under 1 & 2 Vict. c. 110, can be made against the estate in his hands. If it is possible to obtain such a judgment under the present practice, a charging order may also be obtained. As matters stand, I agree with Stirling J. that on the construction of this order nisi the charge is upon the interest of the only person who can be pointed out as a "judgment debtor," that is the dead man, and it is of no effect as against the executor.

VAUGHAN WILLIAMS L.J. I agree. It is clear that under the Act 1 & 2 Vict. c. 110, there must be a judgment debtor who can shew cause against making a charging order nisi absolute. Here it is not and cannot be suggested that there is a judgment debtor, for the person against whom the judgment was recovered was dead, and no judgment had been obtained against his executor.

But it is said that, although that is true, something else has been done which is so equivalent to a judgment against the executor that we ought to hold that the requirements of the statute have been satisfied. That something consists in the order which has been obtained under Order XLII., r. 23, giving leave to issue execution against the executor. I cannot agree that that is equivalent to a judgment against the executor. It is not in fact a judgment against him, and I cannot hold that the requirements of the statute are satisfied by it. Indeed, I much doubt whether, if you could proceed under the statute after the death of the judgment debtor without obtaining a judgment against the executor, this order under Order XLII., r. 23, would be either necessary or useful. But all we have to say now is, whether such an order under Order XLII., r. 23,

does so satisfy the requirements of the statute as to enable the judgment creditor to get a charging order against the executor. I am clearly of opinion that it does not.

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Solicitors: *Markby, Stewart & Co.; May, Sykes & Co.; Johnson, Weatherall & Sturt, for Wade, Bilbrough, Booth & Co., Bradford.*

W. L. C.

In re MILWARD & CO.

C. A. 1900 *Feb.* 16.

[1899 M. 3100.]

Practice—Security for Costs—Foreigner resident Abroad—General Inquiry—Claimant to Fund in Court—Person in Position of Plaintiff.

As a general rule a claimant under a general inquiry cannot be required to give security for costs.

Where a solicitor was ordered to pay into court a fund in his hands belonging to a client subject to the claims of certain alleged incumbrancers thereon, and an inquiry was directed who was entitled thereto, a foreign claimant resident out of the jurisdiction was ordered to give security for costs upon the ground that, in the special circumstances of the case, the inquiry was equivalent to an interpleader issue in which the claimant was in the position of a plaintiff.

APPEAL from a decision of Kekewich J.

On January 18, 1899, Mrs. Gardner obtained a common order against Messrs. Milward & Co., whom she had employed as her solicitors in certain proceedings, for delivery and taxation of their bill of costs, with the usual additional direction for the taking of a cash account; and upon the taxation the master certified that a sum of 826*l.* 18*s.* 1*d.* was due from them to her.

Messrs. Milward & Co., however, alleged that there were further costs due to them which had been inadvertently omitted from their bill of costs, and that at Mrs. Gardner's request they had given undertakings to certain creditors of hers for payment of their claims against her, which undertakings amounted to equitable assignments of the money in their hands; and accordingly they applied for liberty to put forward their further claim for costs, and to appropriate the balance of the fund in their hands in discharge of these undertakings. The matter

C. A. 1900 MILWARD & Co., *In re.*

came first before Kekewich J., and afterwards before the Court of Appeal, and, in the result, an order was made that Messrs. Milward & Co. should be allowed to retain in their hands 350*l.* to answer their further claim, and that a sum of 454*l.* 11*s.* 6*d.* should be paid into court, and an inquiry was directed to whom this sum belonged.

Under this inquiry Mr. P. B. Shield, of Richmond, Virginia, in the United States, claimed to have a charge upon the fund for a large amount. One other claimant only had come in under the inquiry, and his claim had been disallowed.

Mrs. Gardner disputed Mr. Shield's claim, and applied that he might be ordered to give security for costs upon the ground that he was resident out of the jurisdiction. Kekewich J. refused the application. He thought it a matter of very serious consideration whether in a case of this kind security for costs ought not to be ordered; but the practice of ordering security for costs had never been extended to the case of a person claiming under a general inquiry who was entitled to funds or property under the control of the Court, and he thought that it was no part of the duty of a judge of first instance to extend the practice merely because in his opinion it might be convenient or right so to do.

Mrs. Gardner appealed.

Warrington, Q.C., and *Austen-Cartmell*, in support of the appeal. In the case of an ordinary inquiry, e.g., as to next of kin, no one is primâ facie entitled, but all the claimants are on the same footing; but here the claimant is in the position of a plaintiff, because there is no question as to the right of Mrs. Gardner to be paid the money which belongs to her unless the claimant can make out his claim. This is substantially an interpleader issue, and in those cases, whoever is in substance the plaintiff, even though not so in form, may be ordered to give security for costs if he is out of the jurisdiction: *Tomlinson* v. *Land and Finance Corporation* (1); *Rhodes* v. *Dawson*. (2)

[VAUGHAN WILLIAMS L.J. referred to *Belmonte* v. *Aynard*. (3)]

(1) (1884) 14 Q. B. D. 539. (2) (1886) 16 Q. B. D. 548.
(3) (1879) 4 C. P. D. 221, 352.

In interpleader cases the Court has authority to order security to be given under Order LXV., r. 6*a*, and Order LVII., r. 15; but, apart from the Rules of the Supreme Court, there is an inherent jurisdiction in the Court to order security for costs, and an order for security may be made, for example, in winding-up proceedings: *Fontaine's Case.* (1) Security will be ordered wherever the claimant is in the position of a plaintiff: *Apollinaris Co.* v. *Wilson.* (2)

Ashton Cross, for the claimant. It is not the practice of the Court to order a claimant under a general inquiry to give security for costs, and there is no ground for departing from the usual practice in this case. Assuming that this inquiry is equivalent to an interpleader issue, the claimant is substantially in the position of a defendant in an action by Mrs. Gardner to impeach his charge.

LINDLEY M.R. If this were a person claiming under an ordinary inquiry under ordinary circumstances, I think that the practice is perfectly well settled not to order security to be given. I do not say that there might not be exceptional cases in which security might be ordered, but the circumstances must be exceptional. But this is not a case of an ordinary inquiry. It is in substance an interpleader order. The solicitors had a sum of money in their hands upon which Shield alleges that he has a charge. That sum belongs to Mrs. Gardner unless Shield can establish his charge. In substance he is in the position of a plaintiff, and not of a defendant. It is Mrs. Gardner's money unless he can make a claim upon it. Under these circumstances, the true analogy is that which I have suggested, namely, that it is an interpleader issue; and, that being so, Mr. Shield must be ordered to give security for costs.

RIGBY L.J. I agree.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *Seal; Milward & Co.*

(1) (1889) 41 Ch. D. 118. (2) (1886) 31 Ch. D. 632.

H. B. H.

C. A. 1900 Feb. 16.

In re TRENCH TUBELESS TYRE COMPANY. BETHELL *v.* TRENCH TUBELESS TYRE COMPANY.

[1899 T. 1757.]

Company—Voluntary Winding-up—Liquidator—Appointment—Validity—Notice of Resolution.

As soon as a resolution for the voluntary winding-up of a company is passed, a liquidator may be appointed without special notice; and, in the case of a voluntary winding-up by special resolution, where the notice of the confirmatory meeting includes notice of a resolution for the confirmation of the appointment of a named person as liquidator, and that resolution is dropped, a resolution for the appointment of another person may be proposed and carried without further notice.

Appeal from a decision of Kekewich J.

The plaintiffs in a debenture-holders' action obtained an order against the company for a receiver, who had taken possession of certain documents.

Subsequently a motion was made by the company, which had since gone into liquidation, that the receiver might be ordered to deliver to Mr. Marreco, the liquidator appointed at an extraordinary general meeting of the company held on November 16, 1899, certain books and documents which were not comprised in the debentures. The plaintiffs were willing to hand over the documents to a properly appointed liquidator, but they objected that the appointment of Mr. Marreco was not valid.

It appeared that, at a meeting of the company duly held on November 1, 1899, resolutions were passed for the voluntary winding-up of the company and the appointment of a Mr. Walker as liquidator. Notice was then given to the shareholders that a meeting would be held on November 16, when the subjoined resolutions duly passed at the previous meeting would be submitted for confirmation as special resolutions—namely, first, that the company should be wound up voluntarily; and, secondly, that "Mr. Walker, of &c., be and is hereby appointed the liquidator to conduct the winding-up." At the

meeting held accordingly on November 16, 1899, the first resolution was passed, but the second failed for want of a seconder, and a resolution was then proposed and carried that Mr. Marreco should be appointed liquidator. Kekewich J. held that the appointment was bad. In his opinion it was not competent for the company to amend a resolution of which notice had been given, and what had been done here was in effect an attempt to make such an amendment. A shareholder was entitled to read the notice sent to him in order to consider whether it was worth his while to attend, and, when he was told that a particular person, in whom, it might be, he had confidence, was to be liquidator, his judgment would be affected by that intimation. The motion would therefore be refused.

The company appealed.

Ward Coldridge, for the company. 1. Mr. Marreco was properly appointed liquidator. As soon as the resolution for the appointment of the first proposed liquidator failed to find a seconder the resolution was a nullity, and the company could do what it could have done if that abortive resolution had not come on; and it is now settled that, when once a resolution for a voluntary winding-up has been passed and confirmed, a liquidator may be appointed forthwith without special notice: *Oakes* v. *Turquand* (1); *In re Welsh Flannel and Tweed Co.* (2); and see *In re Indian Zoedone Co.* (3)

There is no evidence that anybody was in fact misled by the notice of the confirmatory meeting.

2. Assuming Mr. Marreco's appointment to be invalid, he was nominated by the directors as the proper person to have the custody of the documents.

Warrington, Q.C., and *Martelli*, for the plaintiffs. We do not deny that a liquidator might have been appointed without notice if there had been no notice with respect to the appointment of Mr. Walker as liquidator; but we submit that the existence of that notice makes a difference, since the shareholders would be led to suppose that no other person would be

(1) (1867) L. R. 2 H. L. 325, 355. (2) (1875) L. R. 20 Eq. 360.
(3) (1884) 26 Ch. D. 70.

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appointed: see Palmer's Company Precedents, 7th ed. Part. II. pp. 618, 619, note.

LINDLEY M.R. The learned judge has acted upon the view that a notice must not be misleading, and that this notice might have been misleading; and for some time I thought he was right, because the only questions to which the attention of the shareholders was called by the notice were whether the company should be wound up, and whether Walker should be appointed liquidator. But, upon looking at the matter more closely, and bearing in mind that it is now settled that as soon as a resolution for a voluntary winding-up has been passed it is competent for the company without notice to proceed to appoint a liquidator, the case assumes a somewhat different aspect. I do not myself believe that Mr. Walker's supporters have been in fact misled or taken by surprise. But then it is suggested that other people kept away from the meeting in the belief that all that could be done as regards the appointment of a liquidator was either to accept or reject Mr. Walker. If they did think that, they made a mistake of law. When a resolution for the voluntary winding-up of a company has been passed at a meeting called upon proper notice, any one can at that meeting, either with or without notice, propose the appointment of a liquidator. That objection, therefore, cannot be upheld. There are two answers to it. In the first place the resolution, the validity of which is now being impeached, was not an amendment of the former one. At the first meeting a resolution was passed for the voluntary winding-up of the company, and also a resolution that Walker should be appointed liquidator. Then came the notice of the second meeting to be held for the purpose of confirming these resolutions, and at that meeting the first resolution was confirmed but the second resolution was not, and in lieu of that a different resolution was passed, namely, that Marreco should be appointed. In the next place, if we give effect to this objection, we do in substance give to directors power to palm off upon the company the liquidator of their nomination, unless the company consents to postpone the meeting and give a fresh notice. We should

not allow that. Every one connected with companies should know that, as soon as a resolution for a voluntary liquidation has been passed, the appointment of a liquidator can be proposed and carried. I think there can be no doubt that the appointment of Mr. Marreco was valid. If there were any doubt about it, I incline to think that the books and documents ought to be handed over to him as the person nominated by the directors to receive them; but I prefer to base my judgment on the ground that the appointment was good.

RIGBY L.J. The first meeting at which a liquidator could be appointed was the confirmatory meeting. I think the directors probably expected that the shareholders would agree to appoint Mr. Walker, but when they found that they would not agree to that, they took the right course and dropped the resolution for his appointment altogether, leaving it to those who wished to appoint another person to propose a second resolution. I think that the liquidator was regularly proposed and elected.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *Phillips & Boyle; Francis & Johnson.*

H. B. H.

C. A.
1900
COZENS-HARDY J.
Jan. 26.
C. A.
Feb. 16.

KIMBER *v.* ADMANS.

[1900 K. 48.]

Covenant—Construction—Building Estate—Restriction as to number of Houses—House—Flat.

A building containing several residential flats constitutes only one house within the meaning of the word "house" in a covenant not to erect more than a certain number of houses, unless there is some context which cuts down or alters the popular interpretation of the word.

Decision of Cozens-Hardy J. affirmed.

MOTION to restrain the defendant until the trial of the action from erecting upon certain plots of land owned by him any building which, by reason of its consisting of flats or otherwise, should constitute more than one house in respect of each forty feet of frontage.

The plaintiffs were owners of two plots of land forming part of a building estate, and had built a house on each of these plots. The whole estate had a frontage of 400 feet upon the east side of Turvey Road, Dulwich, and was divided into four plots. The defendant had bought the two remaining plots, which together had a frontage of 200 feet, and he proposed to erect on these plots four blocks of residential flats, each with a frontage of fifty feet. Each block was to contain two flats on the ground-floor, and two flats on the first-floor. Each flat would consist of two living-rooms and a kitchen, with scullery and offices.

The plaintiffs alleged that the defendant was bound by a covenant that "no house shall be erected on any part of the four plots of less value than 500*l.*"; that "not more than ten houses shall be erected on the said four plots," and they commenced an action for an injunction to restrain the defendant from breaking the covenant. The defendant denied his liability, but agreed for the purposes of the motion to assume that he was bound by the covenant.

The motion was heard before Cozens-Hardy J. on January 26, 1900.

Eve, Q.C., and *W. H. Cozens-Hardy*, for the plaintiffs. If the defendant erects four blocks of flats he will break the covenant in two ways. Each flat is a house, and the result will be the presence on the estate of more than ten houses, and that each house will have cost less than 500*l.*, although each block may have cost more than that sum. It has been decided in *Rogers* v. *Hosegood* (1) that each flat in a block of flats is a separate "messuage or dwelling-house," and that those words in a restrictive covenant do not refer to the whole building. That decision applies also to a "house."

[COZENS-HARDY J. referred to *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*. (2)]

In *Rogers* v. *Hosegood* (1) Farwell J. expressly decided the point on the first question then before him.

Buckmaster, for the defendant. There will be no breach of the covenant. The plaintiffs are not really finding fault with the structure of the proposed buildings, but to the use which it is intended to make of them. There is nothing about user in this covenant as there was in *Rogers* v. *Hosegood*. (1)

[He was stopped by the Court.]

COZENS-HARDY J. I think on this point I must hold that the erection of the block of flats is not a breach of the covenant which, for the purpose of the argument to-day, is assumed to be running with the land. It is after all nothing more nor less than a question of the construction of this particular document, and one has to consider what is the meaning of the word "house" in a deed or document where there is no context to cut it down or to alter its popular interpretation. On that point I have the authority of Sir George Jessel in *Attorney-General* v. *Mutual Tontine Westminster Chambers Association* (2), where he said that a building of this nature is, both in ordinary parlance and in legal meaning, a dwelling-house, although it may also be for certain purposes regarded as a number of separate messuages. He illustrated the proposition by saying that any one of the buildings in the Temple or Lincoln's Inn, which, as we all know, are divided into separate

(1) W. N. (1899) 223; 69 L. J. (Ch.) 59. (2) (1876) 1 Ex. D. 469.

C. A. 1900 KIMBER v. ADMANS. Cozens-Hardy J.

chambers, is nevertheless one house. Of course, there may be a great deal in the context of the deed which leads to a different conclusion, and I am really asked in the present case to follow, as I should always be very glad to do, the judgment of Farwell J. in the case of *Rogers* v. *Hosegood* (1), in the absence of any such context or description as he found in that case. There the covenant with which he was dealing was that, "No more than one messuage or dwelling-house, with such suitable outhouses and stabling (if any) as it might be thought fit to erect in connection therewith, should at any one time be erected or be standing on such plot, and that such messuage should be adapted for and used as and for a private residence only, and that no trade or business should at any time be carried on in or upon such plot." The next deed, or a subsequent deed after one house had been erected, contained no limitation as to the number, but a covenant that the messuage or buildings on this adjoining plot should be adapted for and used as and for a private residence, and necessary outbuildings and stables only, and that no trade or business should be carried on. Now, Farwell J. in considering this question says in his judgment: "This is a mere question of the construction of a particular document." He treats the second covenant as meaning really the same as the first, and says that a large building which is to be used as thirty or forty separate residential flats does not answer the description of a messuage to be used as and for a private residence. There is in the present case nothing whatever to limit the user of the building—nothing whatever beyond this covenant that no house shall be erected of less value than 500*l.*, and a limit to the number of houses. I have seen the plans. That which it is proposed to erect seems to me to be a house of the value of more than 500*l.*, and none the less a house of that value because it is proposed to be used as a series of flats. I must, therefore, make no order on the motion except that the costs be costs in the action.

H. C. R.

C. A. The plaintiffs appealed. The appeal was heard on February 16, 1900.

(1) W. N. (1899) 223; 69 L. J. (Ch.) 59.

W. H. Cozens-Hardy, for the plaintiffs. The erection of a block of residential flats on a plot of land is a breach of a covenant not to erect more than one house thereon: *Rogers* v. *Hosegood*. (1)

[VAUGHAN WILLIAMS L.J. The decision in that case was based upon circumstances not appearing in the present case.]

In ordinary parlance each flat is properly described as a house, and it is so regarded in law for many purposes—e.g., in cases of burglary and house-breaking: *Attorney-General* v. *Mutual Tontine Westminster Chambers Association*. (2) The learned judge relied upon the judgment of Jessel M.R. in that case in the Appeal Court (3); but the late Master of the Rolls there admitted that separate portions of a building might be properly treated as a house; and see *Evans and Fynch's Case* (4); *Lee* v. *Gansel* (5); *Chapman* v. *Royal Bank of Scotland* (6); *Yorkshire Fire and Life Insurance Co.* v. *Clayton*. (7)

This block of buildings is a series of houses superimposed one upon the other. If this is not a breach of the covenant it would be open to any purchaser to destroy the neighbourhood by building a block of tenements for working men. The covenant is directed against the user rather than the building.

Buckmaster, for the defendant.

LINDLEY M.R. I have no hesitation in saying that the judgment of the learned judge is right. The ingenious argument of the counsel for the appellant is utterly unconvincing. A property was sold in lots according to a plan for building purposes, and each lot was subject to a covenant that not more than one house should be built upon it. What does that mean? Does it refer to the mode in which the building to be erected is to be subdivided or let, or does it refer to the aggregate of the rooms or whatever the contents of the building may consist of? I think that the latter is the meaning. The house is the whole amalgamation. We know, of course, that a portion of a house may for some purposes, such, for example, as rating and franchise,

(1) W. N. (1899) 223; 69 L. J. (Ch.) 59.
(2) (1875) L. R. 10 Ex. 305, 317.
(3) 1 Ex. D. 469, 475, 476.
(4) (1637) Cro. Car. 473.
(5) (1774) Cowp. 1, 8.
(6) (1881) 7 Q. B. D. 136, 140.
(7) (1881) 8 Q. B. D. 421.

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be a house; but when the word is used in connection with a covenant of this description, I cannot agree that that is the meaning. It applies, not to the interior portions of the building, but to the whole building. The appeal must be dismissed.

RIGBY L.J. I agree.

VAUGHAN WILLIAMS L.J. I agree. I assent to the argument in support of the appeal to this extent: that I think one must, in construing this restrictive covenant, ask oneself what was the object of the covenant, and if I found myself in such a position that I could see no object in the covenant if it was simply limited to the bricks and mortar erection, I should have been disposed to put upon the word "house" a meaning which would cover the user of the house as distinguished from the physical erection. But I do not find myself in that position, and I do not think that any one who is familiar with building estates in London would have any difficulty in ascertaining the object of this covenant, if we construe it as a covenant in which the word "house" means the physical erection and not the interior arrangement.

Solicitors: *Todd, Dennes & Lamb; Cree & Son.*

H. B. H.

In re BIRKS.
KENYON *v.* BIRKS.

C. A. 1899 Dec. 6, 8.

[1898 B. 1809.]

Will—"Issue"—"Children"—Construction.

Where in a deed, will, or other document a word has a clear and definite meaning when used in one part, but has not when used in another, the presumption is that the word is intended to bear the same meaning in the latter case as in the former.

Twelve distinct legacies contained gifts over to the "issue" of legatees dying in the testator's lifetime. Except in the case of the eleventh legacy, the gift over in each contained words clearly restricting "issue" to "children." In the eleventh case the gift over to "issue" contained no words of restriction whatever:—

Held, reversing Kekewich J., [1899] 1 Ch. 703, that the restriction of "issue" to "children" applied to the gift over in the eleventh legacy as well as to the gifts over in the other legacies.

APPEAL from Kekewich J. (1).

Warrington, Q.C., and *John Dixon*, for the appellant, a son of John Birks Piggott, were stopped by the Court.

S. Dickinson, for the respondent, a grandchild of John Birks Piggott. I submit that the decision of the learned judge below is right, and that the wider meaning of the word "issue" in this particular gift ought not to be restricted by the limitation put upon the word in the other gifts. *Sibley* v. *Perry* (2) can no longer be regarded as laying down any general rule, but merely as a decision upon the particular words of the will in that case: *Ralph* v. *Carrick*. (3) There is no rule that words used in a particular sense in one gift are to be taken to be used in the same sense in other gifts: *Dalzell* v. *Welch* (4); *In re Warren's Trusts*. (5) [He also referred to *Carter* v. *Bentall* (6), *Head* v. *Randall* (7), and *Rhodes* v. *Rhodes*. (8)]

[LINDLEY M.R. referred to Theobald on Wills, 4th ed. p. 269.]

(1) [1899] 1 Ch. 703.
(2) (1802) 7 Ves. 522; 6 R. R. 183.
(3) (1879) 11 Ch. D. 873, 882.
(4) (1828) 2 Sim. 319; 29 R. R. 110.
(5) (1884) 26 Ch. D. 208.
(6) (1840) 2 Beav. 551, 558.
(7) (1843) 2 Y. & C. Ch. 231.
(8) (1859) 27 Beav. 413, 417.

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It is to be observed that in this case the legatee named, John Birks Piggott, had died nine years before the date of the will, and that some of his children were also dead at the date of the will leaving children then living. His "issue"—not "children" merely—must therefore be regarded as primary objects of the gift.

P. O. Lawrence, Q.C., and *J. G. Wood*, for the trustees of the will.

LINDLEY M.R. Although it is true that among lawyers "issue" is generally taken to mean descendants, we must not allow ourselves to be misled by that. We must not start with any predisposition to read the word in that way, but we must look at the will and try and see whether the testator has shewn what he meant when he used the word.

The word "issue" is said to have a flexible meaning—it may mean "children," or it may mean descendants of any degree. There is no hard and fast rule, and what we have to discover is the sense in which this testator has used the word in this will. He has used the word so often that we cannot help seeing his meaning. In eleven cases out of twelve we can see that he means by "issue" simply "children." If, then, we find it to be clear, in eleven out of twelve cases, that in using the word "issue" he means "children," what is the natural inference to be drawn in the twelfth case, where he has thrown no light upon the meaning of the word? The natural conclusion is that he uses the word in the same sense in which he has used it before. That is good sense. I do not know whether it is law, or a canon of construction, but it is good sense to say that whenever in a deed, or will, or other document, you find that a word used in one part of it has some clear and definite meaning, then the presumption is that it is intended to mean the same thing where, when used in another part of the document, its meaning is not clear.

To see that the testator in this will did intend "issue" to mean "children" we have only to look at the will. There are clauses of two kinds which shew that. The first is where the testator speaks of the issue taking the share or legacy of "their deceased parent or parents." It is not necessary to

refer to *Sibley* v. *Perry* (1) to see that "issue" there means "children." I have only to look at the will itself and see the sense in which the testator has used the word. In the other kind of clause the phraseology is too plain for any dispute: it is where he says that if the legatee shall die in his lifetime leaving lawful issue such issue shall have and be entitled to the legacy in equal shares if more than one, and if only one, the whole "to such one child." The meaning cannot be mistaken there; and, speaking generally, wherever it is plain what the testator meant by the word "issue," wherever there is any guidance at all, we can see that he meant "children" only, and not all descendants. There is one clause in which the word "issue" occurs, as to which one cannot speak with the same confidence, there being no context to explain the meaning; but there the inference is clear that he meant the word to have the same meaning as before. I think that is plain, and we do not want any canon of construction on the subject.

The way to interpret a will of this kind is to look at it and ascertain what the testator meant, and then see whether there is any established canon of construction which prevents the Court giving effect to that construction. I think the learned judge has gone wrong in holding that in this particular gift "issue" means descendants. It is plain that the word means "children," and there is no canon of construction preventing the Court giving it that meaning. The appeal must be allowed.

SIR F. H. JEUNE. I am of the same opinion. It is not a canon of construction, but only a concise way of putting a principle of common sense, to say that when a testator has made a dictionary for himself we must look at that to see in what sense he has used words in his will; and it would be doing less than justice to common sense to say that where a testator has qualified the meaning of a word in one part of the will it must not be assumed that in some place where he has not qualified it he did not mean to do so. That phraseology, as to a man making a dictionary for himself in his will, means what it says. If we find from a will, as we do

(1) 7 Ves. 522; 6 R. R. 183.

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here, that a testator has used a word in a particular sense, we must give it that meaning wherever it occurs in the will. It is the same thing as if a foreign word were used—a case of which I have known. In such a case we have to get at the meaning of the word in English from an ordinary dictionary, and then whenever it occurs give it that English meaning.

Of course the dictionary must be clear; and if we cannot make out what the testator meant, then we have not got the dictionary; but where, as in this case, we can see what the testator meant, because we find that wherever the context explains the meaning he puts on the word "issue" he meant it to be the equivalent of "children," then, when we have got so far, we can see that he meant "issue" to be the equivalent of "children" also in the cases where the term is used without explanatory context. That seems to be the sense of the word as used by the testator throughout this will. Of course, in other wills it may mean a different thing.

ROMER L.J. I agree. Of course, if the word "issue" is used in a general sense, it must have the larger meaning of "descendants" given to it; but it may be gathered from the will in a particular case that the testator meant the word to have a more restricted meaning, or that in one place he intended it to have the restricted meaning and in other places the wider.

The intention must depend upon the words of the will, and one may gather from the will that the testator has used the word "issue," which is a flexible word, in the more limited sense of "children." Looking at this will, I find, as regards the solitary case where the testator has not clearly defined his meaning of the word "issue," that he has, from the use which he has made of the word in other parts of his will, shewn that he meant it to have the more limited meaning—that is, that in that case also the word "issue" was to have the common signification of "children."

Solicitors: *Andrew, Wood & Purves, for Newman & Bond, Barnsley; A. W. W. Holt; Belfrage & Co., for Kenyon & Son, Thorne.*

G. I. F. C.

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[1897 G. 2051.]

Company—Prospectus—Misrepresentation—Misleading Statement—"Untrue Statement"—Director—Promoter—Shareholder—Contract—Rescission—Damages—Compensation—Directors Liability Act, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1—*Contract by Company, Directors, or Promoters—Omission from Prospectus—Concealment—"Fraudulent" Prospectus—Waiver Clause in Prospectus or Application Form—Catching Conditions—Notice—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A misleading statement in a prospectus is an "untrue statement" within s. 3, sub-s. 1, of the Directors Liability Act, 1890. The liability imposed by that section for any untrue statement in a prospectus is absolute and is in no way affected by the consideration whether the statement was untrue in the sense in which it was used by those who issued the prospectus. Persons issuing a prospectus containing an untrue statement can only escape liability under the statute by proving that they had "reasonable ground" for believing, and did in fact believe, the statement to be true.

Sect. 38 of the Companies Act, 1867—which enacts that every prospectus shall specify the dates and names of the parties to any contract entered into by the company or the promoters, directors or trustees thereof, and that any prospectus not specifying the same shall be deemed "fraudulent" on the part of the promoters, directors and officers of the company knowingly issuing the same—cannot be evaded by a general waiver clause in the prospectus, or in the form of application for shares, to the effect that a subscriber for shares shall waive all claim for non-compliance with the section. A waiver clause, to be effectual as against a subscriber, must fairly disclose the circumstances which confer the rights which by the clause he agrees not to enforce.

The Court will refuse to give effect, as against a shareholder, to a "tricky" waiver clause in a prospectus or application form, upon the same principles as are applicable to catching conditions of sale as between vendor and purchaser or to general words in releases.

Judgment of Kekewich J. affirmed.

The defendant company, the Leather Shod Wheel Company, Limited, was registered on February 12, 1897, under the Companies Acts, 1862 to 1893, with a nominal capital of 300,000*l.* in 300,000 shares of 1*l.* each. The object of the company was to acquire and work certain patents for leather tyres for wheels

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of vehicles. The defendant Thomas Harrison Lambert was the promoter of the company, and the defendants J. E. Jameson, W. Lambert, C. N. Baker, and J. H. Mace were its directors, the defendant Jameson being also its chairman. By the authority and in the names of the defendants, the directors, and also by the authority of the defendant T. H. Lambert, the promoter, a prospectus, dated February 10, 1897, was issued to the public inviting subscriptions for 200,000 shares. At the head of the prospectus was the following, printed in large capital type: "Orders have already been received from Bank of England, House of Commons, Royal Mint, the Secretary of State for War, the leading railways, omnibus and cab proprietors, &c." The body of the prospectus contained under the head (in capitals) of "Orders," the following statement: "Wheels for the trolleys in the House of Commons have been ordered, and are now in use"; also a statement that "The Secretary of State for War has given an order for wheels for military carriages, and wheels have been ordered by the Director of Clothing of the Royal Army Clothing Department. Instructions have been received to prepare trial sets of wheels for the General Post Office, the London Road Car Company," and several other public bodies and institutions named; also that "The following may be specially mentioned among those who have already given orders in England with a view to their adoption," naming the "Bank of England, Royal Mint," several railways, omnibus and cab proprietors, contractors, and other "large users of wheels." It also stated that having regard to the number of trolleys, over 100,000, used by the English railways, the income to the company, on those alone, for the first year's working, and at the prices already accepted, "should amount to about 50,000*l*."

At the end of the prospectus, under the heading in large print, "The following agreement has been entered into," was a paragraph in smaller print than in the rest of the prospectus, giving particulars of an agreement dated February 5, 1897—being, it was stated, an agreement for sale to the company "of the patents and rights at a profit"—and then continuing thus: "There may be other agreements as to the formation

of the company, the subscription to the capital, or otherwise, to none of which is the company a party, and which may technically fall within s. 38 of the Companies Act, 1867. Subscribers will be held to have had notice of all these contracts and to have waived all right to be supplied with particulars of such contracts, and to have agreed with the company, as trustees for the directors and other persons liable, not to make any claims whatsoever or to take any proceedings under the said section, or otherwise in respect of any non-compliance therewith."

The plaintiff received a copy of the prospectus, and on the faith of it, as he alleged, he on February 15, 1897, applied for 1000 shares in the company, by filling up and signing a printed application form the material parts of which were as follows: "To the Directors of the Leather Shod Wheel Company, Limited.—Gentlemen, I beg to apply for 1000*l.* ordinary shares of 1*l.* each in your company, on the terms of the prospectus and of the memorandum and articles of association of the company, and I agree to accept the same or any lesser number you may allot to me, and to pay the further instalments thereon when due. I further agree with the company, as trustee for the directors and others liable, to waive any claims I may have against them for non-compliance in the said prospectus with s. 38 of the Companies Act, 1867, or otherwise. I enclose cheque for 100*l.*, being 2*s.* per share payable on application." The 1000 shares were duly allotted to the plaintiff, and he paid the full amount of 1000*l.* thereon.

The plaintiff subsequently discovered, as he alleged, that the prospectus contained various material misrepresentations as to the so-called orders for wheels, intended to lead to the belief that very substantial orders had been given, whereas the truth was that the orders actually given were merely "trial orders," that is, orders for wheels on trial or approval, and not affording any foundation for the belief that the company would be able to commence business on a permanent basis. The plaintiff further alleged that the prospectus contained various omissions, especially an omission to specifically refer to an agreement

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of December 3, 1896, which he had discovered had been entered into between the defendant T. H. Lambert, on the one hand, and the Coria Syndicate, Limited—who were ultimately the ostensible vendors to the defendant company — on the other, whereby it was agreed that the syndicate should purchase a number of leather tyre patents from one Lembcke, a nominee or agent of T. H. Lambert, on the terms of allotting half of its share capital to Lembcke, and the other half, less the seven statutory shares allotted to the subscribers to the syndicate's memorandum of association, to T. H. Lambert, who thus on the ultimate sale to the defendant company acquired a substantial interest in it. The plaintiff further discovered that by the agreement of February 5, 1897, referred to in the small-print paragraph of the prospectus, the syndicate agreed to sell to a trustee for the defendant company then about to be formed, one only, as the plaintiff alleged, out of the numerous patents comprised in the agreement of December 3, 1896, the purchase-money being expressed to be partly in fully paid shares in the defendant company and partly either in cash or fully paid shares.

On making these discoveries the plaintiff, on October 1, 1897, repudiated his shares and demanded repayment of the amount he had paid for them. On the company denying his right to repudiate, he, on October 14, 1897, issued the writ in this action against the company, the directors, and the promoter, claiming — (1.) a declaration that he had been induced to take the shares by misrepresentation and non-disclosure of material facts; (2.) rescission of his contract and rectification of the register by removing his name therefrom; (3.) repayment of the amount paid by him with interest at 5 per cent. per annum; and (4.), against the defendants other than the company, a declaration that the prospectus was fraudulent on the part of the defendants within the meaning of s. 38 of the Companies Act, 1867, and damages for the loss sustained by him by reason of his having been induced to subscribe for shares on the faith of the prospectus, and indemnity or compensation for the loss sustained by him by reason of untrue statements in the prospectus.

At the trial of the action before Kekewich J. a number of witnesses were examined and cross-examined, including the plaintiff and the several defendants. In giving judgment the learned judge held that the prospectus was misleading and that the statements in it were untrue in several respects, especially as regarded "orders," the fact being that at the date of the prospectus the company had not received a single "order" in the commercial sense, but only orders for trial sets of wheels as samples for experiment. His Lordship therefore held that as against the company the plaintiff had established his right to have his contract rescinded and his money returned; that by reason of these untrue statements the defendant T. H. Lambert, as the promoter of the company, was liable to the plaintiff under s. 3, sub-s. 1, of the Directors Liability Act, 1890; that the defendants, the directors, believed those statements to be true, but had not established such "reasonable ground" for their belief within s. 3, sub-s. 1 (*a*), of the Directors Liability Act, 1890, as enabled them to escape liability under that Act; also, that it had not been established that any of the directors were aware of the existence of the agreement of December 3, 1896, to which the defendant T. H. Lambert, the promoter of the company, was a party, and that therefore, as against him alone, the prospectus must be "deemed fraudulent" under s. 38 of the Companies Act, 1867, the particular form of "waiver clause" in the prospectus and application for shares being insufficient to exempt him from liability to the plaintiff. Accordingly the learned judge's findings of fact were (1.) that the plaintiff took his shares on the faith of the prospectus; (2.) that some of the most important statements in the prospectus had been so worded as to be seriously misleading and untrue, although each, if taken separately, might be true in a sense; (3.) that the defendants, other than T. H. Lambert, were directors of the company, and that he was a promoter of it; (4.) that the defendants issued or authorized the issue of the prospectus; and (5.) that even if the defendants believed the statements to be true they had not reasonable ground for that belief.

On these findings the learned judge on February 23, 1899,

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gave judgment whereby he ordered rescission of the plaintiff's contract to take shares, and repayment by the defendant company to the plaintiff within one month of the 1000*l.* paid by him; also rectification of the register of shareholders of the defendant company by removal of the plaintiff's name therefrom; and made declarations that the several defendants, the directors, and T. H. Lambert were severally liable under the Directors Liability Act, 1890, to pay compensation to the plaintiff by reason of the untrue statements in the prospectus, and also that, as against the defendant T. H. Lambert alone, as a promoter of the defendant company, the prospectus was to be deemed fraudulent under s. 38 of the Companies Act, 1867; and that all the defendants, the directors and T. H. Lambert, were severally liable to pay to the plaintiff the said sum of 1000*l.*, together with interest thereon at 4 per cent. per annum from the respective dates of the payments made in respect of that sum; and it was ordered that the last-named defendants should, in default of payment by the defendant company as aforesaid, pay the said sum and interest to the plaintiff within two months after service of the judgment; then there was an order to tax the plaintiff's costs of the action, exclusive of the costs incurred by reason of the charge against the defendants, the directors, under s. 38 of the Companies Act, 1867, and also to tax the costs incurred by the last-named defendants by reason of that charge, and that the last-mentioned costs should be set off against those first mentioned; and that the balance of the plaintiff's costs should be paid by all the defendants; and it was ordered that the operation of the judgment should be suspended pending an appeal.

From that judgment four notices of appeal were given: (1.) by the defendant J. E. Jameson; (2.) by the defendants W. Lambert, C. N. Baker, and J. H. Mace; (3.) by the defendant company; and (4.) by the defendant T. H. Lambert.

The appeals were heard on December 11, 12, 1899.

The nature of the evidence relied upon in the Court below and on the appeals sufficiently appears from the arguments on the appeals and from the considered judgments of the Court.

Swinfen Eady, Q.C., *Warrington, Q.C.*, and *Hans Hamilton*, for the defendant Jameson. The action is based upon the principle of *Derry* v. *Peek* (1); s. 38 of the Companies Act, 1867 (30 & 31 Vict. c. 131), and s. 3, sub-s. 1, of the Directors Liability Act, 1890 (53 & 54 Vict. c. 64). Kekewich J. held that Jameson honestly believed the statements in the prospectus to be true, and that the action as an action of deceit failed as against him. He was not a promoter of the company and he was ignorant of the agreement which was not disclosed, and therefore he had no occasion to rely upon waiver of s. 38. The only relief given as against him was compensation under s. 3, sub-s. 1, of the Directors Liability Act, 1890, on the ground that he had no "reasonable ground" for believing the statements in the prospectus to be true. The statement in the prospectus, that orders for the wheels had been given "with a view to their adoption," was strictly true. Before the prospectus was issued, Jameson satisfied himself that the orders mentioned in it had been actually given. In one case he found that an order had not been given, and he caused the name of the company which was said to have given it to be struck out of the prospectus. He had reasonable ground for his belief in the truth of the statements made. The prospectus cannot be properly construed as meaning that orders had been already placed on a commercial scale. Jameson knew nothing about any collateral agreement to indemnify those who gave orders for the wheels. The plaintiff does not allege that he was misled by the statement that orders had been given "with a view to their adoption." He said in his evidence that he had not read the waiver clause.

Buckley, Q.C., and *T. Willes Chitty*, for the defendants W. Lambert, C. N. Baker, and J. H. Mace. The plaintiff's claim against the directors is based on three grounds: First, it is said that they have been parties to a prospectus that is fraudulent in stating that "orders" for wheels had been received. But in point of fact orders, though only trial orders, had been received.

[LINDLEY M.R. The prospectus undoubtedly goes too far.

(1) (1889) 14 App. Cas. 337.

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It is a tricky prospectus—one of which it may be said that it is true by the card.]

Then, secondly, it is said that they are liable for being parties to a prospectus that is "fraudulent" under s. 38 of the Companies Act, 1867, through non-disclosure of the agreement of December 3, 1896. But the learned judge below has relieved them of that point by finding that the charge against them of wilful concealment has not been proved, and he has given them the costs occasioned by that charge. The real claim we have to meet is, thirdly, that we are liable under s. 3, sub-s. 1, of the Directors Liability Act, 1890 (1), to pay the plaintiff compensation for the loss he has sustained by reason of the untrue statements in the prospectus. The question, then, is, whether these directors are thus liable. This case is the first in which the true meaning of the Act as affecting the liability of directors has had to be considered, for *Drincqbier* v. *Wood* (2) does not touch the present question. And in that case it may be observed that the director there made liable did not trouble to read the prospectus or inquire into its contents, which is not the case here. Before the Act the law, as laid down in *Derry*

(1) Sect. 3, sub-s. 1, of the Directors Liability Act, 1890, enacts as follows: "Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved:—

"(*a*) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true; . . . ."

(2) [1899] 1 Ch. 393.

v. *Peek* (1), was that a director was not liable for an untrue statement if, when he made it, he honestly believed it to be true; that for a negligent representation, as distinguished from a fraudulent representation, there was no liability; and that there must be the mens rea to ground an action for deceit. And it was also necessary to prove that the person sued himself made the statement. But the Act of 1890 has now extended the liability of directors. Sect. 3 first of all enlarges the class of persons liable for a misrepresentation in a prospectus. It is not the person who made it who is alone liable, but every person who was a director at the time of issuing the prospectus, and every promoter of the company and every person who authorized the issue of the prospectus is now liable to pay compensation for any loss occasioned by "any untrue statement." Does then "untrue statement" mean a statement that is untrue in fact, or a statement that is untrue in the sense in which it is used by the persons issuing the prospectus? We submit the latter is the proper meaning: *Smith* v. *Chadwick*. (2) What has now to be ascertained is whether the statement is one which the parties making it had no reasonable ground for believing to be true. To escape liability under s. 3 the person who makes or is party to a statement must shew he had "reasonable ground" for believing that the statement was true. What then is "reasonable ground"? Honest belief will not suffice now: it must be shewn that the belief was not only honest, but based on reasonable grounds. If the statement is made carelessly, though under an honest belief in its truth, the liability attaches. Now here the directors were not careless as to what was stated in the prospectus: on the contrary, the evidence shews they were careful, and therefore, so far as they were concerned, the prospectus was an honest prospectus, and so the learned judge has found. They thought that sample orders had been obtained with a view to obtaining commercial orders. We submit that they had "reasonable ground" for their belief that the statements in the prospectus were true. To paraphrase the words of the statute, the liability attaches "for every statement untrue in fact which

(1) 14 App. Cas. 337. (2) (1884) 9 App. Cas. 187; (1882) 20 Ch. D. 27, 37.

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the person making it has not reasonable ground for believing to be true." Having regard to the evidence shewing the circumstances under which the statements in the prospectus were made, we submit that the directors should succeed on three grounds: first, that the statements were true in the sense in which the directors made them; secondly, that they had reasonable grounds for their belief in the truth of those statements; and, thirdly, that the plaintiff had not established that he had taken his shares solely upon the faith of those statements.

Bramwell Davis, *Q.C.*, and *G. Alexander*, for the defendant company. We do not dispute that, if the plaintiff makes out that he took his shares on the faith of a misrepresentation in the prospectus, he is entitled to rescind. This is an honest prospectus: it can only be made out to be improper or untruthful by putting a gloss upon its expressions. When fairly read, all it states is that the company has obtained experimental orders with a view to exploiting a business. Allowance should be made for the sanguine expectation of promoters: *Central Railway Company of Venezuela* v. *Kisch*. (1)

E. Ford, for the defendant T. H. Lambert, the promoter. The learned judge decided against me on the ground both of s. 3, sub-s. 1, of the Directors Liability Act, 1890, and of s. 38 of the Companies Act, 1867. Upon the first ground I adopt the arguments urged on behalf of the directors. As to the other ground, the case was pressed really against my client alone, as the evidence did not shew that any of the directors were aware of his agreement of December 3, 1896. The question, then, is whether he is liable under s. 38 (2), for non-

(1) (1867) L. R. 2 H. L. 99, 113.

(2) Sect. 38 of the Companies Act, 1867, is as follows: "Every prospectus of a company, and every notice inviting persons to subscribe for shares in any joint stock company, shall specify the dates and the names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice, whether subject to adoption by the directors of the company, or otherwise; and any prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract."

disclosure of that agreement. I submit that the waiver clause in the prospectus, and also in the application for shares, debars the plaintiff from relying on the section.

[ROMER L.J. Your contention then is that, no matter how fraudulent a contract may be, there is nothing in the Act to prevent a shareholder from contracting himself out of the Act.

LINDLEY M.R. Suppose this is a fraudulent prospectus as against the company and you the promoter, the entire prospectus is a fraud including this waiver clause. What then becomes of the waiver?]

There is no enactment in the Act that a shareholder shall not contract himself out of it.

[ROMER L.J. Assume that there was a contract by the plaintiff not to take advantage of the Act, how can you bind him when you state in your prospectus that there "may be" other agreements when you knew there were? In your case you are a promoter knowing of this contract, and yet you put in a misleading statement that there "may be" other agreements. That, surely, is not a case in which you can say there is a waiver.]

I rely strongly on the waiver clause in the application form. To say that the plaintiff is not bound by that is to say that he may commit a breach of contract. After that contract he cannot turn round and say my client is liable. The allotment was made by the company upon the terms stated in the application form, and upon no other.

[LINDLEY M.R. The expression in the application form, "or otherwise," is very significant. It covers a common law action of tort. It means that the shareholder shall not sue on any ground at all.]

But the fact remains that the plaintiff has solemnly contracted himself out of this head of relief. Whether a company can put in a prospectus or application form a clause to protect itself, or whether a shareholder can contract himself out of the Act, has never yet been decided; but I submit that such a clause is not in itself unreasonable.

Warmington, Q.C., *Renshaw, Q.C.*, and *Norman Craig*, for the plaintiff.

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[LINDLEY M.R. We will not trouble you on any point but this one of waiver.]

This agreement should clearly have been disclosed, as it in effect deals with the purchase-money payable by the defendant company. Upon the question of waiver, generally speaking, a proper waiver may not be precluded by the Act. But the fact which is to be waived must be disclosed in such a way as to bind the shareholder, just as, by analogy to the case of vendor and purchaser, a waiver clause in conditions of sale must state the facts in such a way as to bind the purchaser. That the agreement of December 3, 1896, should have been disclosed by the prospectus is clear, for the effect of it was that the promoter, T. H. Lambert, would be largely benefited at the expense of the subscribers for shares. Moreover, the clause, especially in the form appearing in the plaintiff's application, is too extensive to possess any validity; it should have been more specific. The words "or otherwise" would extend to "however fraudulent."

[ROMER L.J. What you say is this: The plaintiff has agreed to take shares on the footing of the prospectus, and it is now found that the statements in it are misleading. He is, therefore, not bound by this form of application at all.]

That is my case; and I say that this waiver clause is totally inoperative. A vendor must state clearly in his conditions of sale what the purchaser is to waive or be bound by or assume, otherwise the purchaser can get out of his contract. That principle is applicable here.

E. Ford, in reply, upon the question of waiver. If non-compliance with s. 38 of the Companies Act, 1867, no matter for what reason, is proved, the waiver clause in the application form at once comes into play.

Cur. adv. vult.

1899. Dec. 19. LINDLEY M.R., after stating the objects of the action, and the five findings of fact by Kekewich J. with his conclusions thereon, proceeded:—It would be mere waste of time to refer to the evidence in support of most of those findings.

That the prospectus was issued by the directors who are defendants, and that Mr. T. H. Lambert was a promoter, and that he took part in the preparation of the prospectus, are facts not now seriously controverted. The attempt to satisfy us that the plaintiff did not take shares on the faith of the prospectus wholly failed. *Arnison* v. *Smith* (1) shews what is meant by taking shares on the faith of a prospectus, and I need say no more on this point. The only matters which affect the whole case and require attention are the meaning of the prospectus, the belief of the defendants in its truth, and the grounds which they had for such belief. There is another point raised by Mr. T. H. Lambert, turning on s. 38 of the Companies Act, 1867, which I will refer to hereafter. The prospectus, in my opinion, is grossly misleading. The very first statement in it, printed in large type so as to attract attention, is that "orders have already been received from (inter alia) the House of Commons." There is a subsequent statement that "wheels for the trolleys in the House of Commons have been ordered, and are now in use." These are statements which it is impossible to justify. The evidence is that the person who supplies refreshments to the House of Commons had one trolley with these wheels. There was no other. It was not ordered by the House, nor by any committee or official on its behalf. The statement in the prospectus would convey to any one reading it a very different meaning from the truth. I can only regard the statement as clearly untrue.

So as regards other orders. No single order had been obtained, except for trial and by way of experiment. The prospectus is fair enough as regards the statement as to trial sets. But the statement which follows as regards orders already given "with a view to their adoption" is of a very different kind. Any person reading this would understand that the persons who had given those orders had satisfied themselves that the wheels would answer their purpose, and intended to adopt them. But the fact is that no single order had been obtained, except for trial and by way of experiment. A good

(1) (1889) 41 Ch. D. 348, 369.

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many of these, moreover, were ordered by persons who took care to incur no liability to pay for them. The statement in question is again, in my judgment, untrue. This is not the first time in which a misleading statement has been judicially held to be untrue. In *Drincqbier* v. *Wood* (1) Byrne J. held that a statement was untrue within the meaning of s. 3 of the Directors Liability Act, 1890, by reason of the suppression of material facts. The statement was untrue because it was distinctly misleading. The principle is sound, and ought not to be open to question.

It was contended that a statement in a prospectus is not untrue, within the meaning of s. 3 of the Directors Liability Act, 1890, unless such statement is untrue in the sense in which it is used by those who issue the prospectus. This contention is, in my opinion, quite inadmissible. Considering the object of a prospectus, and the object of the Directors Liability Act, the meaning which is important is the meaning which the prospectus conveys to those who read it. The meaning of those who issue it becomes all-important when such persons are charged with fraud; for, if a statement is ambiguous, it may be misunderstood without any fraud on the part of the person who makes it. Upon this point I will refer to what I said in *Smith* v. *Chadwick* (2), and to that I adhere. But the object of the Directors Liability Act, 1890, was to remove the defect in the law brought to light by the decision of the House of Lords in *Derry* v. *Peek* (3), and to impose upon those who issue prospectuses the duty to take reasonable care not to make untrue statements. This object would be very inadequately attained if the Court held that a grossly misleading statement was not "untrue" within the meaning of the Act in question.

As regards the care taken by the defendants not to make any untrue statement, the evidence shews that, although they took care to see that they had orders from the persons mentioned in the prospectus, they took no care at all to see that the prospectus as a whole was not misleading, which, as I have

(1) [1899] 1 Ch. 393, 407. (2) 20 Ch. D. 79.
(3) 14 App. Cas. 337.

already said, in my opinion it clearly was. Upon the main part of the case the decision of the learned judge was right, and the appeals fail.

One part of the order, however, affects Mr. T. H. Lambert alone, and it raises a very important question as to the effect of what are called "waiver clauses" on s. 38 of the Companies Act, 1867. The prospectus in this case omitted all reference to an important contract of December 3, 1896, by which Mr. T. H. Lambert was to obtain considerable benefits. There can be no doubt that this contract ought to have been disclosed in the prospectus. Mr. T. H. Lambert has been held to have infringed this section, and an order has been made against him as to costs, of which he complains. The other directors apparently knew nothing of the contract in question, and no similar order was made against them. Kekewich J.'s view was that the waiver clause could not avail Mr. T. H. Lambert because the plaintiff was not sufficiently informed of what he was waiving. I am of the same opinion, but, as this matter is one of great importance, I will state my reasons for my conclusion.

The first part of s. 38 enacts that every prospectus of a company, and every notice inviting persons to subscribe for shares, shall specify the dates and names of the parties to any contract entered into by the company, or the promoters, directors, or trustees thereof, before the issue of such prospectus or notice. The second part of the section enacts that every prospectus or notice not specifying the same shall be deemed fraudulent on the part of the promoters, directors, and officers of the company knowingly issuing the same, as regards any person taking shares in the company on the faith of such prospectus, unless he shall have had notice of such contract.

A prospectus, therefore, which does not comply with the first half of the section is to be deemed fraudulent, as between the persons issuing it, on the one hand, and all persons taking shares on the faith of it, on the other, except only in one case—namely, if they have notice of the contract, of which some particulars have to be given in compliance with the first part of the section.

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Considering the manifest object of this section, which is to compel the persons issuing prospectuses to afford to persons invited to take shares the information required by the section, it is obvious that the words, "unless he shall have had notice of such contract" mean a great deal more than "unless he shall have some vague information which, if followed up, will lead to such notice." Notice in the section means, not what is called "constructive notice," but actual notice, that is, notice which brings home to the mind of a reasonably intelligent and careful reader such knowledge as fairly, and in a business sense, amounts to notice of a contract. Any other construction would render the section perfectly useless. Again, what is to be deemed fraudulent is the prospectus as a whole. It may contain some true statements, but the introduction of these will not save the prospectus from being deemed fraudulent as a whole. The introduction into the prospectus of a tricky waiver clause, instead of preventing the prospectus from being deemed fraudulent, affords an additional reason for holding it to be so in fact.

The waiver clause in the prospectus of this company is, in my opinion, clearly tricky and fraudulent on the part of Mr. T. H. Lambert. It is printed in small type, so as to escape attention; it is worded so as to conceal, and not to afford notice of, the contract of December 3, 1896, to which he, the promoter, was a party. The language "there may be contracts which perhaps ought to be referred to," when it was perfectly well known, to Mr. T. H. Lambert at all events, that there certainly was one which ought to have been disclosed, stamps the clause as tricky and dishonest, so far as he is concerned.

But then it is said that the application for shares contains another waiver clause. But the application for shares refers to the prospectus, and was sent out with it, and the waiver clause in the application for shares is as tricky as the other, and is even worse by reason of the words "or otherwise," which increases its scope beyond all reasonable bounds. Literally construed, it would, if effect were given to it, afford a defence to the whole action. If a company's prospectus is fraudulent at common law, or is to be deemed fraudulent under s. 38 of

the Companies Act, 1867, and an applicant for shares signs a contract which is intended to deprive him of his right to redress, he is not bound in equity by what he signs, unless his attention is called to the existence of facts which render the prospectus fraudulent. The introduction of a stipulation that an applicant for shares is to be deemed to have notice of what is in fact concealed from him, is simply part of the trick had recourse to in order to evade the consequences of the improper concealment. Such a stipulation in a tricky waiver clause like the one before us affords no protection to the person who seeks protection from it. The principle of refusing to give effect to parts of documents so as to prevent successful deception by means of them is quite familiar in its application to general words in releases, and to catching conditions of sale. The refusal is based on ordinary principles of honesty, and is as applicable to tricky waiver clauses as to other tricky documents.

I wish to guard myself against being supposed to go further than I intend. I have no doubt that a person who takes shares on the faith of a contract which is fraudulent at common law, or which is deemed to be fraudulent under s. 38 of the Companies Act, 1867, may elect to keep his shares, and may agree not to enforce his right to damages. But, in order to bind him by election or agreement, he must be fairly dealt with; and his attention must be fairly drawn to the facts, or at all events the existence of facts, which confer the rights which he elects or agrees not to enforce. If his attention, instead of being drawn to such facts, is drawn from them, the attempt to catch him will fail.

I am aware that, owing to the wide language of s. 38, there is sometimes practical difficulty in determining whether all contracts which apparently come within it are really such as to require notice in a prospectus: and to put in a long list of contracts, which no applicant for shares would care to know anything about, would frighten the public and do no good to any one. These difficulties have given rise to honest attempts to protect honest men by waiver clauses from the consequences of honest unintentional breaches of the law. General waiver clauses in prospectuses, applications for shares, articles of

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association, or other documents addressed to large numbers of persons are, however, always suspicious, and require careful scrutiny. When the Court has to deal with an honest case of the sort above mentioned, the Court will, I have no doubt, be able to come to a just conclusion, and will, if necessary, uphold the clause. On the present occasion we have no such case to deal with. Mr. T. H. Lambert, the promoter, has ingeniously endeavoured to shield himself from the consequences of concealing a contract to which he dared not allude, and his appeal, like the others, must be dismissed with costs.

SIR F. H. JEUNE concurred.

ROMER L.J. I agree, and desire only to add a few words. The more I consider this prospectus, the more I am convinced that, though it is cunningly drawn, it is not, in relation to the persons to whom it was addressed, an honest document. It was cunningly framed so as to avoid as far as possible telling in so many words absolute untruths; but it was so framed as to convey as a whole a perfectly untrue meaning. It was, in my opinion, calculated to convey and did convey to the ordinary reader, as it did to the plaintiff, that the invention referred to in it had passed the experimental stage in England, and that numerous orders, besides mere trial orders, had already come into the company from influential bodies, firms or persons, from which the value of the invention and the first prospects of the company would naturally be inferred. I particularly refer in the prospectus to the statement at the very top of it, which says that "orders have already been received from Bank of England, House of Commons, Royal Mint, the Secretary of State for War, the leading railways, omnibus and cab proprietors, &c."; and then to the important statements all grouped under the word "orders" where, amongst the orders given, are enumerated orders by the House of Commons, the Secretary of State for War, and the Royal Army Clothing Department. That is followed by two clauses which are clearly put in contrast one with another. It is stated that instructions have been received to prepare trial sets of wheels for a number of public bodies and influential firms there mentioned; and

then follows this statement: "The following may be specially mentioned among those who have already given orders in England with a view to their adoption"; and then follows another long list of names of public bodies, firms, and persons of position and influence.

Now the last two clauses, as I have said, are clearly put in contrast one with the other; and, to my mind, the natural meaning of the last clause, looking at the context, would be that the public bodies, firms, and persons therein mentioned have not given merely trial orders, but have given actual ordinary orders, and that they have done so because their intention is to adopt this invention.

What are the short facts of the case as proved by the evidence? Shortly speaking, they are as follows: At the date of the prospectus the company had not a single order, except in so far as what I am about to state could be in any true sense described as "orders." Several of the public bodies, firms, and persons mentioned in the prospectus had expressed their willingness to test the invention by having trial sets of wheels sent to them for the purpose of experimenting upon and testing the invention; and as to some of these, the cost of the wheels was to be paid for by the experimenters, and not by the company. Now that states the true position of the company with regard to these so-called orders at the time the prospectus was issued. The company in fact had not a single ordinary order in its possession at that time. In my opinion, the prospectus was, in these respects, not only calculated to mislead, but contained untrue statements within the meaning of s. 3, sub-s. 1, of the Directors Liability Act, 1890. Again, in one respect, in my opinion, not only were the statements in the prospectus untrue in substance, but they were not true even according to the letter. I refer to the statement that amongst the orders "wheels for the trolleys in the House of Commons have been ordered and are now in use," the true facts being that at that time one set of wheels for one trolley had been ordered by the refreshment department of the House of Commons, and one trolley was being used by the refreshment contractor.

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So far as the company is concerned, therefore, it is clear that it has no answer to the plaintiff's claim. The plaintiff really relied upon the prospectus, and read the parts I have referred to, and on the evidence I am satisfied that, in point of substance and not of detail, he read those parts in the way and sense in which they were intended to be and would be naturally read as I have already stated.

The defendants other than the company no doubt stand in somewhat different positions. The question in regard to them is whether they are liable in an action for damages. In considering that, the most important question is, What did the directors know about the facts which are set forth in the prospectus? Now, from their own account, they knew everything material except that the cost of some of the trial sets of wheels, which on the written documents had to be paid for by the experimenters, was in fact not to be borne by them. They themselves say that they carefully and often considered the terms of the prospectus and looked at all the orders. The conclusion is, therefore, that they did not issue that prospectus carelessly or ignorantly. That being so, I can see no justification or excuse on their part for letting such a prospectus as this go forth to the public. I agree that they were careful, but I fear the carefulness only extended to seeing that no particular phrase in the prospectus could be laid hold of as being in itself of necessity untrue. The carefulness did not, in my opinion, extend to seeing that the prospectus as a whole was not misleading, or to seeing that those parts to which I have already referred were not in substance untrue. I need not say whether or not these defendants could have been held liable, or ought to have been held liable, in an ordinary action for deceit at common law, but I must not be understood as expressing any opinion that they could not be held so liable. It is sufficient for me to say that this prospectus contained statements untrue within the meaning of the Act of 1890, and that it has not been proved to my satisfaction at all that the defendants had any reasonable ground for believing those untrue statements to be true in fact.

I should also like to add this. Much has been said about

the construction of the Act of 1890. In my opinion nothing can be more mischievous, when words are plain in an Act of Parliament, than to try and refine upon them; and in my opinion this Act of Parliament at any rate is a perfectly plain and intelligible Act. To make a person issuing a prospectus primâ facie liable under this statute it is sufficient to shew that statements contained in it—of course I mean material statements—are substantially untrue. If that is proved, then, to enable that person to escape liability under the statute, what he has to prove is—and this is the material point in the case before us—that he had reasonable ground for believing, and did in fact believe, that those statements were true.

In my opinion, these appeals must be dismissed with costs.

Solicitors: *Maddisons; Ashwell, Browning & Tutin; Beyfus & Beyfus; Blachford, Riches & Norton.*

G. I. F. C.

STIRLING J.

1899

July 13.

1900.

Jan. 18; *Feb.* 8.

In re PRICE.
TOMLIN *v.* LATTER.

[1899 P. 2.]

Conflict of Laws—Power of Appointment—Personal Property—Execution—Domiciled Foreigner—Unattested Will—Validity—Construction—Administration with Will annexed—Wills Act, 1837 (1 *Vict.* c. 26), *ss.* 9, 10, 27—*Lord Kingsdown's Act* (24 & 25 *Vict.* c. 114), *s.* 1.

A will of a domiciled foreigner, which is valid by the law of the testator's domicil and has been recognised as a valid will in this country by the Probate Division, is capable of operating as an execution of a power of appointment by will over personal estate under an English instrument, although the formalities required by ss. 9 and 10 of the Wills Act have not been observed.

D'Huart v. *Harkness*, (1865) 34 Beav. 324, followed and approved.

In re Kirwan's Trusts, (1883) 25 Ch. D. 373, and *Hummel* v. *Hummel*, [1898] 1 Ch. 642, distinguished, on the ground that they apply only to wills which owe their validity to Lord Kingsdown's Act (24 & 25 Vict. c. 114).

Although as a general rule a will is to be construed according to the law of the testator's domicil, this rule does not apply where there are indications on the face of the will that the testator wrote it with reference to the law of some other country.

A domiciled French subject, having a general power of appointment over a fund under an English instrument, left all her property to her husband by a holograph will made in French form and unattested. The will was valid by the law of France, and letters of administration with the will annexed were granted in this country. The will contained indications that it was intended to take effect in England as well as in France:—

Held, (1.) that it was competent for the testatrix to execute the power by a will in this form, notwithstanding ss. 9 and 10 of the Wills Act; (2.) that the same rules of construction ought to be applied to it as would be applied to an English will in the same terms and of the same date, including the rule of construction introduced by s. 27 of the Wills Act.

Held, therefore, that the general bequest operated as a valid execution of the power in favour of the husband.

Dame Elizabeth Price, by her will, dated March 28, 1876, bequeathed a sum of 2000*l.* to trustees upon trust for investment and payment of the income to a lady described as "Maria (the daughter of my late cousin Mary Ann Draper deceased) now the wife of Monsieur Adolphe Gay" during her life for her

separate use without power of anticipation. The will then proceeded: "And from and after her decease to pay and transfer the last-mentioned sum of 2000*l.* in such manner as she the said Maria Gay shall by her last will appoint, and, in default of such appointment, then to such person or persons as would at the time of her decease be the next of kin of the said Maria Gay in case she had died intestate and without being married."

Lady Price died on March 18, 1878.

At the date of the will Maria Gay was the wife of Adolphe Gay, a French subject domiciled in France. Monsieur Gay died on October 12, 1882; and in October, 1886, Madame Gay married Monsieur Auguste Dié Forfillier, also a French subject domiciled in France.

On June 2, 1887, Madame Forfillier made a holograph will in the French language, of which the following is a translation:—

"I the undersigned declare that I bequeath to my dear husband Auguste Dié Forfillier, retired officer, Chevalier of the Legion of Honour everything which I possess at the present moment, and which I hereafter may possess. I appoint him guardian of my dear daughter Marie Anne Olinka Gay . . . . And I declare that this will annuls all the others, as I have informed Mr. Archibald Willett, solicitor, Bromley, Kent, and that it shall thus be considered in England the same as in France, and I repeat that I leave everything which I possess at the present moment and which I may come to possess afterwards to my dear husband because I know his great disinterestedness and am convinced that he is more capable than any one else to safeguard the interests of my dear daughter." (1)

On September 21, 1893, she made a holograph codicil to her will not material to the present purpose.

The will and codicil were unattested.

On February 16, 1898, Madame Forfillier died, and on October 30, 1898, letters of administration with the will annexed were granted by the Probate Division to the defendant Edward Latter as the attorney of Monsieur Forfillier. At the date of her death Madame Forfillier had no interest in any property

(1) [The reporter is not answerable for the English.—F P.]

STIRLING J. in England except the property subject to the power of appointment.

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This summons was taken out by the trustees of the will of Lady Price to have it determined who was entitled to the fund of 2000*l.*

Madame Forfillier was at the time of her death a French subject by virtue of the Naturalization Act, 1870, s. 10, sub-s. 1. She was also domiciled in France. The law of France was stated in the evidence to be that the will of Madame Forfillier was a complete testamentary disposition of the whole of the property which the testatrix might have at her death or which she might by law dispose of; that the mode of disposition by appointment was not practised in France; and that if a French Court had to consider the effect of the will in this respect it would inquire into and apply the English law bearing on this point; and would also take cognizance of and give effect to the fact that the testatrix had no interest in any property in England except that which was subject to the power of appointment.

A. àB. Terrell, for the summons.

Waggett, for M. Forfillier and his step-daughter. 1. This will is a valid exercise of the power notwithstanding the provisions of ss. 9 and 10 of the Wills Act. (1) The will is valid by the law of France, and operates to dispose of all property which the testatrix could dispose of, and it has been recognised as a valid will in this country by the Probate Division. Neither the Wills Act nor Lord Kingsdown's Act (2) has any applica-

(1) Sect. 10 of the Wills Act provides that "no appointment made by will, in exercise of any power, shall be valid, unless the same be executed in manner hereinbefore required; and every will executed in manner hereinbefore required shall, so far as respects the execution and attestation thereof, be a valid execution of a power of appointment by will, notwithstanding it shall have been expressly required that a will made in exercise of such power should be executed with some additional or other form of execution or solemnity."

(2) Lord Kingsdown's Act (24 & 25 Vict. c. 114) provides by s. 1 that "every will and other testamentary instrument made out of the United Kingdom by a British subject (whatever may be the domicile of such person at the time of making the same or at the time of his or her death) shall as regards personal estate be held to be

tion to this case; for the Wills Act applies only to the wills of persons who have an English domicil: *Bremer* v. *Freeman* (1), and Lord Kingsdown's Act, which alters the law with respect to domicil as regards wills of personal estate, is expressly limited to the wills of British subjects. The testatrix being a domiciled French subject, she could not have made a valid will in English form: *In the Goods of Von Buseck* (2); *Bloxam* v. *Favre* (3); and the power of appointment is not limited to English wills, but applies to any will recognised as valid in England. This case is covered by *D'Huart* v. *Harkness.* (4)

There are cases going to shew that, where a will of a domiciled alien is in exercise of a power, probate may be granted although the will is in English form: *In the Goods of Alexander* (5); *In the Goods of Hallyburton* (6); and these cases have recently been followed by Sir F. Jeune, though not approving, in *In the Goods of Huber* (7); but the only object of those decisions was that the Chancery Division might not be deprived of the opportunity of considering the instrument, and they are not material to the present case.

In this case the will operates as an exercise of the power independently of s. 27 of the Wills Act, since there is no property in England upon which the will could take effect except the property subject to this general power: *Shelford* v. *Acland* (8), distinguishing *Evans* v. *Evans* (9); *Curteis* v. *Kenrick* (10); *Churchill* v. *Dibben* (11); *Attorney-General* v. *Wilkinson.* (12)

2. Assuming that there was no appointment, the daughter is

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well executed for the purpose of being admitted in England and Ireland to probate, and in Scotland to confirmation, if the same be made according to the forms required either by the law of the place where the same was made or by the law of the place where such person was domiciled when the same was made, or by the laws then in force in that part of Her Majesty's dominions where he had his domicile of origin."

(1) (1857) 10 Moo. P. C. 306, 359.
(2) (1881) 6 P. D. 211.
(3) (1883) 8 P. D. 101; (1884) 9 P. D. 130.
(4) 34 Beav. 324.
(5) (1860) 29 L. J. (P. M. & A.) 93.
(6) (1866) L. R. 1 P. & M. 90.
(7) [1896] P. 209.
(8) (1856) 23 Beav. 10.
(9) (1856) 23 Beav. 1.
(10) (1840) 9 Sim. 443.
(11) (1754) 9 Sim. 447, n.
(12) (1866) L. R. 2 Eq. 816.

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entitled as next of kin of the testatrix. The words "without being married" in the gift in default of appointment mean "without having a husband at the time," and the intention was merely to exclude the husband: *Stoddart* v. *Saville.* (1)

Bovill, for persons claiming to be entitled in default of appointment. 1. This will is not a valid exercise of the power because it is not attested as required by s. 10 of the Wills Act. The validity of a will of personalty as an exercise of a power does not depend upon the domicil of the testator at the time of his death: Theobald on Wills, 4th ed. p. 1; *Tatnall* v. *Hankey* (2); *In the Goods of Alexander.* (3) Those cases have since been followed, and cannot now be disputed. Sect. 10 of the Wills Act is a general provision, and is not limited to English wills; it applies wherever the instrument creating the power is English. This case is governed by *In re Kirwan's Trusts* (4) and *Hummel* v. *Hummel.* (5)

Further, assuming that the Wills Act does not apply, then s. 27 does not apply; and, that being so, it is necessary, in order that the will should operate as an exercise of the power, that it should contain a clear reference either to the power or to the property. This will does not comply with that requirement.

2. "Without being married" means without ever having been married: *Dalrymple* v. *Hall* (6); *In re Sergeant.* (7)

Waggett, in reply. *D'Huart* v. *Harkness* (8) is referred to in *Hummel* v. *Hummel* (5), but not in *In re Kirwan's Trusts.* (4) In *Hummel* v. *Hummel* (5) Kekewich J. distinguishes *In re Kirwan's Trusts* (4) from *D'Huart* v. *Harkness* (8) upon the ground that Kay J.'s decision was limited to wills which owed their validity to Lord Kingsdown's Act, and he purports to follow that decision. Those cases have no bearing upon the present, because neither the Wills Act nor Lord Kingsdown's Act applies to the will of a domiciled French subject.

Cur. adv. vult.

(1) [1894] 1 Ch. 480.
(2) (1838) 2 Moo. P. C. 342.
(3) 29 L. J. (P. M. & A.) 93.
(4) 25 Ch. D. 373.
(5) [1898] 1 Ch. 642.
(6) (1881) 16 Ch. D. 715.
(7) (1884) 26 Ch. D. 575.
(8) 34 Beav. 324.

Feb. 8. STIRLING J. (after stating the facts as above). Under the will of Lady Price the fund is to be paid and transferred in such manner as Madame Forfillier "shall by her last will appoint." The first question arises as to the word "will" which there occurs—whether it means any instrument recognised by the law of England as a will or a will executed in accordance with the law of England. I shall first consider the three authorities which have been cited to me as bearing on this subject. The first is the case of *D'Huart* v. *Harkness*. (1) There, under the will of an English lady, a sum of Consols was held upon trust for her daughter for her separate use for life, and after her decease upon trust for such persons as her said daughter "by her last will and testament in writing duly executed" should direct or appoint. The daughter was an Englishwoman by birth, but she married a domiciled Frenchman and resided in France till her death; she made a will, which was not attested, whereby she bequeathed the sum of Consols to her husband. This will was valid by the law of France and had been admitted to probate in this country. It was held by Lord Romilly that the will was a valid execution of the power. It will be observed that, as regards the facts, that case is as near to the present case as one case can be to another. The material portion of the judgment is this (2): "A sum of money is given simply, to such person as the Baroness shall by her last will duly executed appoint. What does that mean? It means a will so executed as to be good according to the English law. Here it is admitted to probate, and that is conclusive that it is good according to the English law. The English law admits two classes of wills to probate, first, those which follow the forms required by 1 Vict. c. 26, s. 9, and secondly, those executed by a person domiciled in a foreign country, according to the law of that country, which latter are perfectly valid in this country. Accordingly, where a person domiciled in France executes a will in the mode required by the law of that country, it is admitted to proof in England, though the English formalities have not been observed. When a person simply directs that a sum of money

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(1) 34 Beav. 324.

(2) 34 Beav. 327.

STIRLING J. shall be held subject to a power of appointment by will, he does not mean any one particular form of will recognised by the law of this country, but any will which is entitled to probate here. A power to appoint by will, simply, may be executed by any will which according to the law of this country is valid, though it does not follow the forms of the statute."

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The next case is that of *In re Kirwan's Trusts* (1), which came before Kay L.J. when a judge of first instance. The facts of that case require some attention. The power there was by deed or will to be executed in the presence of two or more witnesses to appoint amongst children. The donee of the power was an English subject. His testamentary disposition consisted of two instruments—first, a will executed in accordance with English law, but invalid according to French law, and, secondly, a codicil not executed in accordance with English law, but valid according to the law of France. In order to have both will and codicil proved here, it was necessary to have recourse to Lord Kingsdown's Act, and the will and codicil, which together made the testamentary disposition, were admitted to probate by virtue of that statute. Now, the instrument which purported to execute the power was the codicil, which was unattested, and, consequently, was not an instrument falling within the terms of the power. Neither did it satisfy the requirements of the Wills Act. Upon that Kay J. says (2): "Now, the codicil was not attested, and therefore it did not fulfil the requisites either of the power or of the Wills Act (1 Vict. c. 26), but it was a good testamentary document under 24 & 25 Vict. c. 114. . . . . This being a good testamentary instrument by the law of the domicil of George Saint Lo Kirwan, which I understand was France at the time, although not executed as required by the Wills Act, has under the Act which I have referred to been admitted to probate in England, and the documents admitted to probate are two, i.e., the will of the 3rd April, 1862, and the codicil of the 9th of May, 1871." Then, after considering the effect of that, he goes on to say (3): "It is a good testamentary instrument, and

(1) 25 Ch. D. 373. (2) 25 Ch. D. 379. (3) 25 Ch. D. 381.

its only defect is its want of attestation. But the Wills Act says that 'no appointment made by will in exercise of any power shall be valid unless the same be executed in manner hereinbefore required,' that is to say, in the presence of and attested by two witnesses. The later Act, 24 & 25 Vict. c. 114, does not refer to that clause, nor, indeed, does it refer to a power of appointment at all. It only does this. It makes a will executed abroad by a British subject a good will if it be such a document as is recognised as a will by the law of that place. But it does not at all touch or interfere with the negative provision in the Wills Act, namely, that no testamentary appointment can be made unless it is attested by two witnesses. Therefore, I do not think it would be possible to treat this codicil as being a good and valid appointment either at law or in equity." Now, I pause there to remark that the facts of that case are different from those of the present case in two respects: first, the power was of a different kind, and, secondly, the testamentary disposition was admitted to probate only by virtue of Lord Kingsdown's Act, whereas here Lord Kingsdown's Act does not come into operation. Unfortunately, *D'Huart* v. *Harkness* (1) was not cited in *In re Kirwan's Trusts* (2), and I have not the benefit of any observations of Kay J. upon it, but it has been considered by Kekewich J. in the recent case of *Hummel* v. *Hummel.* (3) The facts stated in the head-note are as follows: "A daughter of a testator had under his will a general power of appointment by will over a share of his residuary estate. The daughter died in France, having while residing there made a disposition of her property by a writing signed by her but not attested, the writing being in form a valid will according to French law"; and it was held that the writing, even if admissible to probate under s. 1 of Lord Kingsdown's Act, did not operate as an execution by the daughter of her general power of appointment by will, since it had not been attested by two or more witnesses as required by ss. 9 and 10 of the Wills Act. The question which I have to decide really did not arise there, because the

(1) 34 Beav. 324. (2) 25 Ch. D. 373.
(3) [1898] 1 Ch. 642.

STIRLING J. document relied on as an execution of the power had not been admitted to probate; but Kekewich J. does consider the question whether, supposing it could be proved, it would be a good execution of the power, and he proceeds on the footing that the will could only be proved under Lord Kingsdown's Act. He says this (1): "It is, I will assume, ... a valid will according to the law of France; but it is not a will that could under the provisions of the Wills Act be proved in this country. The question is, Can it operate as an exercise of a general power of appointment by will? As to that, the decision of Kay J. in *In re Kirwan's Trusts* (2) is conclusive that it cannot, even if it had been a will that could be proved in this country. Is that decision inconsistent with *D'Huart* v. *Harkness* (3), where Sir J. Romilly M.R. decided that a power to appoint 'by a will duly executed' is well exercised by a will good according to the law of the country of the testator's domicil, though ill executed according to the law of England? That case, as already mentioned, was not referred to in *In re Kirwan's Trusts* (2); but the latter is cited in a note on p. 308 of 1 Williams on Executors, 9th ed., as the authority for the proposition that in the case of a will which is only valid by reason of the Act 24 & 25 Vict. c. 114, ss. 9 and 10 of the Wills Act must be complied with. That appears to me to form the distinction between the two cases." Then he refers to Lord Kingsdown's Act. The opinion there expressed by the learned judge appears to me to be that *D'Huart* v. *Harkness* (3) was not inconsistent with *In re Kirwan's Trusts* (2), upon the ground that the latter decision only applied to a case in which the will was proved under the provisions of Lord Kingsdown's Act. That Act only applies to the wills of British subjects. Madame Forfillier was not a British subject but a French subject, and as a matter of fact the grant of letters of administration with the will annexed was not under Lord Kingsdown's Act at all. Therefore, looking at the authorities and having regard to the view taken by Kekewich J., I am of opinion that I ought to follow *D'Huart* v. *Harkness* (3) and not *In re Kirwan's Trusts*. (2)

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(1) [1898] 1 Ch. 645. (2) 25 Ch. D. 373.
(3) 34 Beav. 324.

But I go further. I think that on principle *D'Huart* v. *Harkness* (1) was well decided. The general rule on the subject is, as stated by Mr. Dicey (Conflict of Laws, p. 684), that "Any will of movables which is valid according to the law of the testator's domicil at the time of his death is valid" in England. It follows that the provisions of an English statute prescribing formalities with reference to wills do not apply to the wills of persons not domiciled in England.

In *Bremer* v. *Freeman* (2) it appears to have been contended that the provisions of s. 20 of the Wills Act as to the revocation of wills applied to the wills of persons domiciled abroad. Lord Wensleydale in delivering the judgment of the Court said that for reasons referred to by him it was unnecessary to consider the point, but added (3): "Their Lordships, however, do not wish to intimate any doubt that the law of the domicile at the time of the death is the governing law (see Story, Conflict of Laws, § 473), nor any that the statute 7 Will. 4 and 1 Vict. c. 26, applies only to wills of those persons who continue to have an English domicile, and are consequently regulated by the English law."

Sect. 9 of the Wills Act prescribes that "no will shall be valid unless it shall be in writing and executed in manner hereinafter mentioned." Notwithstanding this language, it is the practice of the Probate Division, on the principle just stated, to admit to probate or otherwise recognise as valid the wills of persons domiciled abroad, although not executed as prescribed by the Act. The present case affords an instance of this being done. I fail to see why the provisions of s. 10 of the Wills Act should apply to the will of Madame Forfillier any more than those of s. 9.

There is, however, a series of cases referred to in the argument which seems to establish that a will purporting to be made in execution of a power is valid if it satisfies the requirements of the instrument creating the power, although it would be invalid according to the law of the domicil of the testator at the time of his death: see *In the Goods of Alexander* (4); *In*

(1) 34 Beav. 324.
(2) 10 Moo. P. C. 306.
(3) 10 Moo. P. C. 359.
(4) 29 L. J. (P. M. & A.) 93.

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the Goods of Hallyburton (1); *In the Goods of Huber.* (2) These cases, however, do not lay down that a power to appoint by will (without special formalities) conferred on a person domiciled abroad cannot be executed by a will valid by the law of the domicil of the donee of the power at the time of his death, and consequently do not appear to me to affect the decision of the present case.

In the view which I take I am not concerned to deal with *In re Kirwan's Trusts* (3), which is distinguishable in its facts from the present case; but I may say that the decision in that case may be rested on these grounds. First, the power was required to be executed by an instrument in a special form which the instrument said to be an execution of the power did not satisfy. Secondly, the Wills Act had no application, inasmuch as the testator was domiciled abroad: and although the instrument was not invalidated by the prohibitory portion of s. 10, it did not derive validity from the enabling portion of that section. In any case the instrument did not satisfy the requirements of the Wills Act. Thirdly, although the instrument was valid by Lord Kingsdown's Act, still, as was pointed out by Kay J., that statute does not contain any enactment dealing with wills made in exercise of powers. Although some of the language used by that learned judge may be susceptible of a different interpretation, I am not sure that he intended to decide anything inconsistent with the principle I have stated.

In my opinion, therefore, it was competent for Madame Forfillier to exercise the power conferred on her by Lady Price's will by such a will as has been recognised by the Probate Division. It remains to be considered whether she has done so. This question is one of construction.

In general a will is to be construed according to the law of the domicil of the testator: "but this is a mere canon of interpretation, which should not be adhered to when there is any reason, from the nature of the will, or otherwise, to suppose that the testator wrote it with reference to the law of some other country": Dicey, Conflict of Laws, p. 695. Considering

(1) L. R. 1 P. & M. 90. (2) [1896] P. 209.
(3) 25 Ch. D. 373.

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first the law of France, according to which primâ facie the will is to be construed, the evidence shews that the will of Madame Forfillier is a complete disposition of all the property which she could dispose of; but it also appears that the mode of disposition by appointment is not practised in France, and that if a French Court had to consider the effect of the will in this respect it would apply the English law. It is contended with regard to the law of England that the provisions of the Wills Act including s. 27, are inapplicable, and that consequently the law of England applicable is the law as it existed before that Act, and that, there being no reference in the will either to the power or to the property, it is not a good execution of the power. If I am to apply the law as it existed before the Wills Act, questions of difficulty might arise; but it appears to me that I can decide this case upon another ground. The testatrix says, "I declare that this will annuls all the others . . . . and that it shall thus be considered in England the same as in France." I think that that amounts to a declaration by the testatrix that she meant the will to operate as her last will in England as well as in France. I think it is indicated upon the face of the will that she wrote it with reference to the law of England as well as the law of France. Therefore I think that I am entitled to apply the rules of construction which would by English law be applied to a will expressed in the same terms and of the same date as that annexed to the letters of administration, including the rule of construction introduced by s. 27 of the Wills Act.

No question arises between Monsieur Forfillier and the daughter of his wife by her first marriage, who by the law of France might have a claim if this fund had been part of Madame Forfillier's property; for she appears and supports the claim of Monsieur Forfillier.

In my opinion, therefore, the husband, Monsieur Forfillier, is entitled to the fund.

Solicitors: *J. L. Tomlin & Son; Van Sandau & Co., for Willett & Latter, Bromley, Kent.*

H. B. H.

STIRLING J.

1900

Feb. 7, 13.

In re THOMAS.
EVANS *v.* GRIFFITHS.

[1897 T. 574.]

Solicitor—Remuneration—Sale by Auction in Lots—Freehold Property held under one Title—Separate Purchasers—Deducing Title—Scale Charge—"Transactions" under 100*l.*—*Minimum Fee—Solicitors' Remuneration Act,* 1881 (44 *&* 45 *Vict. c.* 44)—*General Order, Sched. I., Part I., rr.* 1, 7, 8.

On a sale by auction in lots of property held under one title, each sale of one or more lots to a different purchaser forms a separate transaction within the meaning of rule 8 of the rules annexed to Sched I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881; so that where the scale charge for deducing title on any of the lots sold to different purchasers does not amount to 5*l.*, the solicitor is entitled to charge the minimum fee prescribed by rule 8 in respect of each separate sale.

Adjourned Summons.

By an order made in the action on November 12, 1898, liberty was given to the plaintiffs to sell out of court the residuary real estate of the testator in the cause. In pursuance of this order, on January 24, 1899, the plaintiffs put up the real estate for sale by auction in eleven lots. Lots 1 to 6 were sold to one purchaser, Phœbe Williams, for 1685*l.* 15*s.* The remaining lots were sold as follows: Lot 7 to Thomas Williams for 28*l.*, lot 8 to John Lewis (No. 1) for 27*l.*, lot 9 to Mr. Griffiths for 32*l.*, and lots 10 and 11 to John Lewis (No. 2) for 24*l.* The property was freehold and was held under one title. Separate abstracts were delivered to each of the five purchasers. The solicitor of the plaintiffs delivered his bill for deducing title to the property and perusing and completing the conveyances on the basis that the scale of charges established by Sched. I., Part I., to the General Order under the Solicitors' Remuneration Act and the rules annexed thereto were applicable. No objection to this was taken before the taxing master. It was suggested at the hearing of this application that the scale did not apply; but his Lordship thought that if there was any

foundation for the objection (as to which he was not satisfied), it came too late, and he declined to entertain it. By his bill the solicitor claimed, under rule 8 of the rules annexed to the schedule, a minimum fee of 3*l.* in respect of each of the sales to the four last-named purchasers. The master held that the minimum fee under rule 8 did not apply, and allowed by his certificate 15*s.* in respect of each of these four sales. This was a summons taken out by the plaintiffs to review the master's taxation.

Of the rules annexed to the schedule, those material to the question provide as follows:—

Rule 1: "The commission for deducing title and perusing and completing conveyance on a sale by auction is to be chargeable on each lot of property, except that where a property held under the same title is divided into lots for convenience of sale, and the same purchaser buys several such lots and takes one conveyance, and only one abstract is delivered, the commission is to be chargeable upon the aggregate prices of the lots." Rule 7: "Fractions of 100*l.* under 50*l.* are to be reckoned as 50*l.* Fractions of 100*l.* above 50*l.* are to be reckoned as 100*l.*" Rule 8: "Where the prescribed remuneration would, but for this provision, amount to less than 5*l.*, the prescribed remuneration shall be 5*l.*, except on transactions under 100*l.*, in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor or mortgagee is to be 3*l.*"

Loehnis, for the plaintiffs, in support of the summons. The solicitor is entitled to the minimum fee of 3*l.* for deducing title, &c., in respect of each of the four sales of lots 7—11. The view of the taxing master is that as the property is all held under one title the solicitor is not entitled to charge the deducing fee for each sale to a different purchaser, but that the sale of the whole of the property must be treated as one transaction.

Under rule 1 of the rules annexed to the schedule the commission is chargeable on each lot, the only exception being when one purchaser buys several lots under one title and takes one conveyance, and only one abstract is delivered. Rule 8

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fixes the minimum charge in the case of transactions under 100*l.* *In re Onward Building Society* (1) is not a direct decision upon the point, but there are dicta in the judgment of Pollock B. which support the construction which I submit ought to be put upon rule 1.

In *Cholditch* v. *Jones* (2) the minimum deducing fee was allowed by the master for separate lots, and no objection was made to the charge. In *In re Margetts* (3) the property was held under different titles, and Kekewich J. said that "where, as in this case, each lot has a separate and distinct title, a separate abstract, and each title is investigated, the solicitor is entitled to the minimum scale fee in each case." That is abundantly clear.

A different interpretation must not be put upon the rules according as the circumstances of each case appear to produce hardship or otherwise. The solicitor takes the rough with the smooth. If the taxing master's view be right, the whole sale must be treated as one transaction, even though each lot be held under a separate and distinct title.

The true view is that each conveyance must be treated as a different transaction.

W. L. Richards, for the defendant. The question depends upon the true construction of rules 1 and 7. I submit that the remuneration is ascertained by giving the commission upon each lot sold. The commission is multiplied by the number of the lots, but there is only one "transaction." What the solicitor had to do in this case was to carry out the sale directed by the order of November 12, 1898: that was the "transaction" in respect of which he was to be remunerated. In rule 12 the word "transaction" obviously means the whole sale by auction. In the General Order made in pursuance of the Act the word occurs in ss. 2 (*c*) and 4, but its use there does not appear to throw any light upon its meaning in the rules.

[STIRLING J. referred to the note at the foot of the schedule: "Every transaction exceeding 100,000*l.* to be charged for as if it were for 100,000*l.*"]

(1) [1893] 1 Q. B. 16. (2) [1896] 1 Ch. 42. (3) [1896] 2 Ch. 263, 267.

The solicitor was retained to sell the whole property. Rule 1 is satisfied by giving him the commission on each lot; rule 7, by reckoning each sum less than 50*l.* as 50*l.*; and rule 8, by allowing him more than 5*l.*

[STIRLING J. Your argument would be the same if each lot were held under a different title.]

Yes; the only exception is that expressed in rule 1. Here the solicitor has done nothing to entitle him to the remuneration claimed by him. In *Wellby* v. *Still* (1) Kekewich J. laid it down that the scale only applies where the solicitor has substantially done the whole of the work thus mentioned.

[STIRLING J. Are you objecting to the application of the scale altogether?]

I take that as a second point. The objection is not taken in the answers; I merely use it as an argument. In the Solicitors' Remuneration Digest, *In re Margetts* (2) is cited with additional facts. There there were different titles.

[STIRLING J. The remarks of Kekewich J. seem to be against your contention.]

This question was not before him.

In re Onward Building Society (3) was mere dictum. That case related to the fee for "conducting sale," and different considerations would apply. In *Cholditch* v. *Jones* (4) the question of deducing title was not before the Court, and that is no authority against me. The machinery of the rules provides for the remuneration of the solicitor by way of commission. The transaction for which the remuneration is to be made is one, although it may be made up of several items of business for which the commission is payable.

Loehnis, in reply. If the "transaction" be the sale of the whole property, then if the sale of one of the lots goes off there will be no "transaction" at all.

[STIRLING J. referred to *In re Lacey & Son.* (5)]

It was there held that, unless substantially the whole of the business in respect of which the ad valorem charge is payable

(1) [1895] 1 Ch. 524.
(2) [1896] 2 Ch. 263, 267.
(3) [1893] 1 Q. B. 16.
(4) [1896] 1 Ch. 42.
(5) (1883) 25 Ch. D. 301.

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is done by the solicitor, the scale does not apply. Here the work has been done. *Wellby* v. *Still* (1) does not apply. Contrasting rule 1 with rule 2, I submit that each sale of any of the lots is a separate transaction.

Cur. adv. vult.

Feb. 13. STIRLING J., after stating the facts and reading rule 1:—That rule applies to all sales by auction in lots, whether the property is held under one title or not, except only where in the former case the same purchaser buys several lots, and takes one conveyance, and only one abstract is delivered. The exception applies in this case to the sale of lots 10 and 11 to John Lewis (No. 2), but no further; consequently the commission is chargeable on each lot sold to a different purchaser, and the master has so held. [His Lordship then read rule 7, and continued:—]

The master has applied this rule in allowing 15*s.* in respect of each of the four sales as above mentioned. Rule 8 is that relied upon by the solicitor. [His Lordship read it, and continued:—]

The taxing master has refused to apply that rule on the ground that the "transaction" to which the rule refers was, in this case, the sale of the whole property referred to in the order of November 12, 1898. It is contended on behalf of the solicitor that each of the five sales resulting from the auction was for the purposes of this rule a separate transaction within the meaning of rule 8. The question which I have to decide is which of these views is correct. The question is one of construction of the rules, and in deciding it little guidance is to be gained from the consideration that in a particular case, or class of cases, the remuneration provided may seem to be excessive. It was observed by Chitty L.J., when a judge of first instance, in *In re Field* (2) that "solicitors take these matters for better or worse. There is, as I have often heard the late Master of the Rolls observe, a kind of give and take in these matters. They get more in one case and less in another, and for this reason very likely in settling this scale some sort of

(1) [1895] 1 Ch. 524. (2) (1885) 29 Ch. D. 608, 612.

rough and ready rule for regulating the remuneration was laid down." These observations apply with some force with reference to rule 1 here considered. It applies to all sales by auction in lots, whether all the lots are held under the same title, or whether each lot is held under a separate title. The labour of deducing title in the former case may often be less than in the latter; still cases might occur where the remuneration at the minimum rate in respect of a large number of lots at a price under 50*l.* would be inadequate. The scale of remuneration presumably has been fixed so as roughly to strike a just average in the different cases which may occur.

Rule 8 speaks of transactions under 100*l.*, and in the argument before me some discussion took place as to the meaning of that. The word "transaction" there obviously means the transaction of some piece of business. Whose business is it? The 100*l.* spoken of in the rule is obviously not a sum with which the solicitor is directly concerned, but one which directly concerns the person who employs him; the business therefore is the business of the client. Further, it must be a piece of business to which the rule is applicable; and the title of this schedule—"Scale of charges on sales, purchases, and mortgages, and rules applicable thereto"—shews that the rule is applicable to sales, purchases, or mortgages.

This is confirmed first of all by a note annexed to the schedule which speaks of every transaction exceeding 100,000*l.* to be charged for as if it were 100,000*l.*, and, secondly, by the words which occur in the latter part of the rule itself—"in which cases the remuneration of the solicitor for the vendor, purchaser, mortgagor, or mortgagee is to be 3*l.*"—which shew that the transactions which are there referred to are exactly those spoken of in the title to the schedule—"Sales, Purchases, and Mortgages." The word "transaction" is therefore a compendious word, used to include these three classes of business. For the present purpose, therefore, the rule may be read as if instead of "transactions" had occurred the word "sales," and then it will run, "Where the prescribed remuneration would but for this provision amount to less than 5*l.* the prescribed remuneration shall be 5*l.* except on sales under

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100*l.* in which cases the remuneration of the solicitor for the vendor is to be 3*l.*" Now, the prescribed remuneration in the present case is governed by rule 1, and when rule 1 and rule 8 modified in the way in which I have just read it are read together, it would seem to me that the natural meaning of a sale under 100*l.* is a sale of each separate lot. This view is confirmed when the object of the rule is considered.

It appears to me obvious that the object of it was to prevent injustice being done to a solicitor in cases where the sum in respect of which his remuneration is payable is small, and that is a matter just as necessary to be provided for in cases where rule 1 applies as where it does not. If, as the framer of the rules must have considered, it was right that solicitors should be remunerated for deducing title and perusing and completing conveyance on a sale by auction in lots by giving them commission chargeable on each lot separately, which, as the taxing master has pointed out, gives an advantage to the solicitor, it seems reasonable that they should be protected against insufficient remuneration in cases where the price for each lot might be small. I therefore come to the conclusion, on the construction of the rules, that the contention of the solicitor is well founded.

I need not go through the cases which were referred to in argument because none of them is directly in point, but so far as they go they seem to support the view which I have taken. In my opinion, therefore, the summons must be allowed with the usual consequences.

Solicitors for plaintiffs: *Greig, Meikle & Briggs, for Evans & Thomas, Llandyssil.*

Solicitors for defendant: *Fielder & Fielder, for W. Hughes Jones, Aberystwith.*

G. A. S.

In re DUKE OF NORFOLK'S PARLIAMENTARY ESTATES. DUKE OF NORFOLK *v.* LORD HERRIES.

BYRNE J.
1900
Jan. 16, 17, 23.

[1899 N. 995.]

Settled Land—Tenant for Life—Capital Money—Improvements—Prospective Order—Settled Land Act, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*iii.*); *s.* 22, *sub-ss.* 1, 2, 7; *ss.* 25, 26, 53.

Trustees for the purposes of the Settled Land Acts may approve a scheme for improvements submitted to them by a tenant for life, before they have capital money in hand and available for the proposed expenditure; when a scheme has been approved under these circumstances, and the improvements have been executed and paid for by the tenant for life bonâ fide with the knowledge of the trustees for the purposes of and in accordance with the approved scheme, early expenditure being for the benefit of all parties interested, in anticipation of moneys becoming afterwards available for the purposes of the approved scheme, the trustees are entitled, either with or without the approval of the Court, to reimburse the tenant for life the money so expended.

In re Millard's Settled Estates, [1893] 3 Ch. 116, distinguished.

ADJOURNED SUMMONS.

The questions raised by this application were whether trustees for the purposes of the Settled Land Acts can approve a scheme for improvements submitted to them by the tenant for life before they have capital moneys actually in hand, and, further, in the event of a scheme having been approved under these circumstances, whether they may reimburse the tenant for life money advanced by him for the purposes of a scheme out of capital money subsequently received.

The facts, so far as material, were as follows:—

The present Duke of Norfolk, as tenant in tail male of the estates settled by an Act of Parliament passed in the third year of Charles I. (a limited owner, having, under the Settled Land Act, 1882, s. 58, the powers of a tenant for life), had from time to time submitted schemes for the improvement of the settled land to his trustees, which had been approved by them, when they had either no capital money in hand available, or not enough to pay for the works proposed by these schemes. The

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Duke had found the money necessary from time to time for carrying out the various schemes, and as the trustees now had capital money in hand, the object of the present summons by the Duke was to obtain repayment from his trustees of the various sums so advanced by him for the purpose of paying for the improvements already executed.

It was admitted that the improvements carried out in pursuance of these schemes were for the advantage of all persons interested in the settled estate, and that the expenditure had been prudent and beneficial in the interests of all concerned.

Ingle Joyce, and *John Dixon*, for the Duke. There is nothing in the Settled Land Acts which requires the capital money to be actually in hand before the trustees can approve a scheme. The Settled Land Act, 1882, s. 2, sub-s. 9, refers to capital money "receivable" for the purposes of the Act. Sect. 21 directs that capital money "when received" may be invested in (iii.) payment for any improvements. It was not suggested in *In re Millard's Settled Estates* (1) that the approval of the scheme was not in the power of the trustees: that would have been a complete answer to the application which was for a prospective order for works not then executed; here the work has been done; that case does not warrant the proposition that capital money must be in hand before a scheme can be approved by trustees. *In re Marquis of Bristol's Settled Estates* (2) was an application under s. 15 of the Act of 1890.

[BYRNE J. referred to *Round* v. *Turner*. (3)]

In re Tucker's Settled Estates (4) supports this contention, because it appears from the report of that case that there were no capital moneys available at the time the tenant for life made the expenditure. The trustees were justified in approving these schemes though they had not capital money in hand at the time, and the schemes having been approved the expenditure made by the tenant for life can now be repaid him. The expenditure here has been made in carrying out a scheme already approved, and in that respect this case differs from

(1) [1893] 3 Ch. 116.
(2) [1893] 3 Ch. 161.
(3) W. N. (1889) 38.
(4) [1895] 2 Ch. 468.

In re Hotchkin's Settled Estates (1), though the difficulty created by that decision has now been removed by s. 15 of the Settled Land Act, 1890.

Levett, Q.C., and *J. M. Stone*, for the trustees. It was no part of the policy of the Settled Land Act, 1882, to encourage prospective dealings with capital moneys. The actual possession of the money is a condition precedent to the approval of a scheme. Sect. 21 points to the present application of money in hand as compared with the prospective application of money hereafter to arise. Sect. 26, sub-s. 2, refers to capital money "in the hands" of trustees; sub-s. 3 refers to money "in court." The applicant therefore contends that trustees have a higher right than the Court. An improvement cannot be properly authorized at a time when there are no funds in hand to carry it out; if trustees or the Court may approve a scheme before capital moneys are available, the tenant for life and the trustees, or the Court, may fetter the judgment of subsequent trustees, and commit the estate to an expenditure before the period arrives at which a proper discretion can be exercised. The principle and the reasoning of the judgments in *In re Millard's Settled Estates* (2) and *In re Marquis of Bristol's Settled Estates* (3) is against the approval of a scheme where no money is in hand. If these schemes could not be approved, then the money was spent by the tenant for life without a scheme and he cannot be repaid: *In re Hotchkin's Settled Estates*. (1)

Dixon, in reply. The meaning of "capital money" is considered in *In re Duke of Marlborough's Settlement*. (4) In *In re Tucker's Settled Estates* (5) it is clear there was no money in hand, and yet the repayment was allowed. If the contention of the trustees is correct, a tenant for life can never execute any improvements with a prospect of being repaid if, at the time of executing the work, there is no money in hand. The observations in *In re Millard's Settled Estates* (2) are directed to the safeguards provided by the Act before payment can be made, and the case is distinguishable on that ground.

Cur. adv. vult.

(1) (1887) 35 Ch. D. 41.
(2) [1893] 3 Ch. 116.
(3) [1893] 3 Ch. 161.
(4) (1886) 32 Ch. D. 1, 5.
(5) [1895] 2 Ch. 468.

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Jan. 23. BYRNE J. This case raises an important question under the Settled Land Act, 1882, and one which does not appear to have been the subject of reported decision; it is whether or not trustees for the purposes of the Act may approve a scheme for improvements submitted to them by the tenant for life before they have moneys in their hands available for the proposed expenditure. There is a second question, which falls for decision in case the first should be answered in the affirmative—namely, whether or not, when a scheme has been approved under these circumstances, and the improvements have been executed and paid for by the tenant for life in anticipation of moneys becoming afterwards available for the purposes of the approved scheme, the trustees are entitled, either with or without the approval of the Court, to reimburse the tenant for life the moneys so expended. The trustees may not apply capital moneys in their hands in or towards payment for improvements unless prior to the execution of the work a scheme has been submitted to and approved by them. There are no words in the Act in terms negativing the right of trustees to approve of a scheme in anticipation of moneys coming to their hands, but I have to consider the scope and provisions of the Act to see whether or not such a right is conferred upon them. It has already been determined in the case of *In re Millard's Settled Estates* (1) that a prospective order cannot be made by the Court authorizing payment by the trustees for work to be done under an approved scheme out of moneys not in their hands at the time when the order is asked for. This was a decision of the Court of Appeal turning upon s. 26, sub-s. 2 (iii.), and it was recognised by the present Master of the Rolls in his judgment that there are no negative words to say the Court cannot make such an order, but he points out that under the other clauses of the same sub-section the trustees cannot pay except upon certificates, which cannot be given prospectively, and takes that as an indication that it was never intended that the Court should make a prospective order, and he states that he cannot find in the Act anything which authorizes the Court to make prospective orders of the kind. This case does

(1) [1893] 3 Ch. 116.

not decide the point now before me, although it has an important bearing upon it from the reasoning adopted, and I will mention particularly one passage in the present Master of the Rolls's judgment where he says (1): "What is wanted is protection—that is, protection for those interested in the land; and as practical men we know that to authorize a thing to be done is a very different thing from approving it when it has been done." It was urged on behalf of the tenant for life, and it is the fact, that in *In re Millard's Settled Estates* (2) the schemes had been approved by the trustees, and it was never suggested in argument, or in the judgments, that this approval was not within the power of the trustees, although the point, if a sound one, would have afforded a complete answer to the application; and the observation is of great weight, though it must not be pressed too far, as the point does not appear to have been suggested or argued, and it may have been passed by as immaterial, having regard to the construction placed by the Court upon the clause of the sub-section under which the order was sought for. The case of *In re Marquis of Bristol's Settled Estates* (3) was an application made under s. 15 of the Act of 1890, and determined that a prospective order could not be made under that section to take effect upon moneys which might thereafter arise; but in the course of his judgment Kekewich J., in considering the meaning of s. 26 of the Act of 1882, makes some observations at the foot of p. 166 shewing that in his view the use of the words "to be expended" points to moneys in hand, and he says: "It seems to me there would be very great difficulty in holding that if expenditure were sanctioned now, there being no money out of which that could be made, there would not be a charge which would have to be raised in the same way as any other charge on the land." To some extent this line of reasoning is applicable to an objection to a construction of the section which would give a power to approve a scheme in anticipation of subsequent receipt of moneys, as there would undoubtedly be grave difficulty, to say the least of it, in the way of refusing

(1) [1893] 3 Ch. 120. (2) [1893] 3 Ch. 116.
(3) [1893] 3 Ch. 161.

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a subsequent order for payment on proper evidence that the moneys had been expended in accordance with the scheme previously approved, especially having regard to the fact that the scheme to be submitted under s. 26, sub-s. 1, must shew the proposed expenditure for the execution of the improvement. *In re Tucker's Settled Estates* (1) was also an application under the Act of 1890, and deals with the principle upon which the Court ought to exercise its discretion in respect of allowing the tenant for life to be reimbursed moneys he has expended without first submitting any scheme; but the observations which have been referred to of the Master of the Rolls and Lopes L.J. in that case about the duty of a tenant for life to submit a scheme must be read in view of the fact that it appears by the report that there were no capital moneys available at the time the tenant for life made the expenditure. I do not think that s. 2, sub-s. 9, or s. 33 of the Act really afford any assistance in the matter, and I only mention them to shew that they have not been overlooked. Capital money arising under the Act shall, "when received," be invested in any of the modes pointed out by s. 21 of the Act including (iii.) in payment for any improvement authorized by the Act. The words "when received" point to the expression "capital money arising under the Act" being used as including money to arise at a future date, and I do not see any good ground for limiting it so as to exclude moneys which may arise at a future time, though not receivable immediately or within any given period. Sect. 22, sub-s. 1, provides that capital money shall, in order to its being invested or applied as aforesaid, be paid either to the trustees of the settlement or into court at the option of the tenant for life, and shall be invested or applied by the trustees or under the direction of the court accordingly, and sub-s. 2 provides that the investment or application by the trustees shall be made according to the direction of the tenant for life. Sect. 25 describes improvements authorized by the Act, and then s. 26 deals with the procedure to be adopted where the tenant for life is desirous that capital money shall be applied in or towards payment for

(1) [1895] 2 Ch. 468.

an authorized improvement. The tenant for life may submit for approval to the trustees or to the court, as the case may require, a scheme for the execution of the improvement.

I do not think that I ought to put so narrow a construction upon s. 26, sub-s. 2, as to hold that it means that the capital money must be actually in the hands of trustees before a scheme is approved by them, or upon s. 26, sub-s. 3, that it means that the money must be actually in court before a scheme is approved, and, indeed, I think it is clear that a literal construction to that effect is impossible, and I may refer to s. 22, sub-s. 7, which shews that securities for capital money are not capital moneys, although they may be converted into money which shall be capital money arising under the Act.

Then it is suggested that if there is money receivable under an existing contract, either presently or in the near future, or if there be securities in court or in the hands of trustees capable of being immediately converted into cash, the amounts so receivable or capable of being turned into cash may in effect be regarded as money in court, or in the hands of the trustees, as the case may be, so as to be in substance and effect moneys in court or in hand; but I feel the difficulty that the moment a departure is made from the supposed literal construction, the matter is very much at large, and I do not see where to draw the line. Is it to be at money immediately payable under a contract, money payable by instalments under a contract, money to be paid in a year, or in two years, or in twenty years?

I was very much impressed by the argument that if trustees or the Court may approve a scheme before capital moneys are available, the tenant for life and the trustees, or the Court, may be really committing the estate to an expenditure before the period arrives at which a judgment ought to be exercised, and s. 53 of the Act and the observations of the Master of the Rolls and of Kekewich J. that I before quoted are appealed to in support of this argument.

But I think the true answer is to be found in this. The scheme of the Act is to give wide powers to the tenant for life,

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and to give power of consent to trustees, upon the footing that they will act fairly in the exercise of their respective powers, and that neither trustees nor the Court will sanction schemes which are improvident, or which will unduly fetter any discretion which ought to be exercised at a later date, and there is always this safeguard, that tenants for life and trustees joining in improvident schemes, or not acting with a due regard to the interest of the remaindermen, are running the risk of the possible establishment of a personal liability against themselves. The Act is framed for honest folk, and what are considered sufficient safeguards and protection are provided for the parties interested. I think the observation of the present Master of the Rolls in *In re Millard's Settled Estates* (1) is to be read with regard to the subject-matter of the case before him, and that he is dealing with the case of safeguards provided by the Act before payment can be actually made, and not with the case of approval of a scheme.

I can see many considerations weighing against the contrary view. Suppose, for example, a tenant for life is desirous of selling a portion of his estate with the special object of effecting what he considers a great improvement upon the remainder of it. I think it would be most unfortunate if he should be obliged first to sell, and then to find that the trustees did not approve of his scheme.

Upon the whole case, and a consideration of the terms of the Act, I have come to the conclusion that a scheme may be approved, although there are not at the time capital moneys in the hands of the trustees for carrying it out.

Upon the second question I am of opinion that if, after a proper scheme has been duly approved, the tenant for life, with the knowledge of the trustees, bonâ fide expends money for the purposes of and in accordance with this scheme, early expenditure being for the advantage of all parties interested, there is no prohibition to be found in the Act against the trustees, when they have capital money in their hands, adopting his expenditure and recouping him what he has actually spent, subject to the proper certificate being obtained. The question of what

(1) [1893] 3 Ch. 120.

might happen should the tenant for life die after his expenditure and before recoupment, and another tenant for life succeed and direct the moneys to be applied in some other way, does not arise for decision, and I therefore express no opinion about it.

I ought to add that in the present case there is not the faintest suggestion that the several schemes, the payments in anticipation by the tenant for life, and the repayments by the trustees, have been otherwise than prudent and for the advantage of all persons interested.

Solicitors: *Few & Co.*

W. C. D.

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Jan. 24.

In re VIMBOS, LIMITED.

[0033 of 1899.]

Company — Winding-up — Debentures — Receiver — Principal and Agent— Surplus Assets—Remuneration—Jurisdiction.

Debentures gave power to the holders to appoint a receiver to realize the assets of the company, without stating what he was to do with the surplus, or that he was to be the agent of the mortgagors. A receiver appointed under this power claimed to retain surplus assets as his remuneration, and the liquidator of the company applied by summons in the winding-up for an order fixing the remuneration, and that the balance should be paid over to him:—

Held, that the receiver was the agent of the mortgagee, not of the company; and that, whether that were so or not, there was no jurisdiction to make the order on the summons, but the liquidator must bring an action against the receiver.

THIS was a summons by the liquidator of the company for an order that the amount of the remuneration payable to the receiver for the debenture-holders of the company might be fixed, and that he might be ordered to pay to the applicant any balance remaining in his hands.

The debentures of the company were in the form of separate mortgages, by which the company, as beneficial owner, charged, by way of floating security, all its undertaking and heritable, movable, and real and personal property with the payment of the principal and interest secured.

By the conditions indorsed on the debenture it was stated that the debenture was one of a series, all of which were to rank pari passu.

Condition 4 was as follows:—

"4. The registered holder of this debenture may, with the consent in writing of the holders of not less than three-fourths in value of the debentures of this series for the time being outstanding, appoint by writing any person or persons to be a receiver or receivers of the property charged by the debentures, and such appointment may be made at any time after the principal moneys hereby secured become payable, and shall be

effective as if all the holders of debentures of this series concurred in such appointment, and a receiver so appointed shall have the power—

"(1.) To take possession of the property charged by the debentures.

"(2.) To carry on, or concur in carrying on, the business of the company.

"(3.) To sell, or concur in selling, any of the property charged by the debentures.

"(4.) To make any arrangements or compromise which they or he shall think expedient in the interest of the debenture-holders of this series."

On November 30, 1898, a Mr. Meadowcroft was duly appointed under this power receiver of the property charged by the debentures. In March, 1899, the company went into voluntary liquidation, which was shortly afterwards continued under supervision. The receiver took possession of and sold the business and assets of the company, and collected book debts of the company to the amount altogether of 33,298*l.* 17*s.* 1*d.* In an affidavit he said: "In consequence of such sale, not only have my principals been paid in full, but I have been enabled to hand over to the liquidator on behalf of my principals a sum of 10,467*l.* 4*s.*, as shewn to be due from me by the accounts. The cash due was handed over and the accounts sent to the liquidator for convenience, and to save the trouble of my having in the first instance to send them to my principals direct, who would in their turn have delivered them to the liquidator." He claimed to retain 1608*l.* 5*s.* as remuneration.

A. R. Kirby, for the liquidator. The receiver should hand over the whole of the money in his hands to the company whose agent he is. In making the appointment the debenture-holders acted as agents of the mortgagor—namely, the company, and the receiver is its agent. He has to receive income, keep down interest, and account for the surplus to the mortgagor: *Gaskell* v. *Gosling* (1) The judgment of Rigby L.J.

(1) [1896] 1 Q. B. 669, 691, 692.

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was expressly affirmed on appeal to the House of Lords. (1) In this case the receiver has actually accepted the position and accounted to the liquidator.

Stewart-Smith, for the respondent. The receiver has handed over considerable sums to the liquidator, but he did so on behalf of his principals, the debenture-holders. There is no general rule that a receiver appointed by a mortgagee is the agent of the mortgagor. No doubt he is in that position when appointed under the Conveyancing Act, 1881, and formerly was so under Lord Cranworth's Act; or the same result may be produced by a special contract, as in *Jefferys* v. *Dickson* (2), which was referred to by Rigby L.J. But, apart from statutory provisions or the terms of the agreement between the parties, he is the agent of the mortgagee. Even if the receiver is the agent of the company, the liquidator cannot make him account by a summons in the winding-up of the company, but must bring an action against him in the ordinary way. The receiver is not a servant or officer of the company; he is altogether outside the liquidation.

A. R. Kirby, in reply. The amount of remuneration must be settled between the receiver and the liquidator. No one else has any interest in the question, and this is the cheapest and most convenient mode of procedure.

COZENS-HARDY J. This case really resolves itself into a question of jurisdiction. It is an application by the liquidator of a company that the amount of remuneration payable to a Mr. Meadowcroft as receiver of debenture-holders may be fixed, and that he be ordered to pay the applicant any balance in his hands. I thought it was coming on by arrangement to assess a quantum meruit; but the receiver's counsel takes the objection, which he is perfectly at liberty to take, that I have no jurisdiction to make the order, and it is therefore necessary for me to consider what is the position of the receiver.

Now the mortgage debentures in this case were in a somewhat peculiar form. There was no covering deed; each debenture-

(1) [1897] A. C. 575. (2) (1866) L. R. 1 Ch. 183, 190.

holder had a separate debenture charging, in the most general terms, the present and future property of the company with the debenture, and by the fourth condition of the debenture indorsed it was stated: [His Lordship read the condition.] It is remarkable that that power differs in almost every material respect from the ordinary power which is given to mortgagees. There is nothing to say that the receiver is to be the agent of the mortgagor, who is solely to be responsible for his acts and defaults, as in the Conveyancing Act. There is nothing whatever to say what he is to do with moneys which he receives. There is no direction to him to keep down the interest on the mortgage, or pay any arrears or surplus over to the mortgagor. There are none of those provisions one finds in an ordinary receivership deed, and it does seem to me that the receiver in these circumstances was the agent of the persons who appointed him, not the agent of the mortgagor; and it follows from that, of course, that the debenture-holders themselves would be answerable for all the faults and omissions of the receiver. If that be so, it seems quite plain that the liquidator has no right at all in these proceedings to get the remuneration of the agent, not of the company, but of the debenture-holders, assessed by the Court. The receiver does not come here asking for remuneration. He has got some money in his hands which the liquidator thinks is more than he is entitled to. The liquidator says the debenture-holders have been paid off, and that the receiver has money in his hands which he ought not to keep. I think, on that footing—namely, that the receiver is agent for the mortgagees, and that this is the money of the mortgagees and not of the company—this application must fail.

But suppose I am wrong in that view—suppose that the true view be this, that although it is not expressed it is implied that the receiver is the agent of the mortgagor, the company, and that the company alone would be responsible for his acts and defaults—I cannot conceive that the liquidator is in any better position. It is not the law that the liquidator can get any claim made by any agent employed by the company assessed in a proceeding like this. Suppose it had been an

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auctioneer or a stockbroker, who had undoubtedly been employed by the company and who had some money in his hands, I cannot find any authority whatever for the proposition that I could in this summary manner and in winding-up jurisdiction direct that the proper remuneration of the auctioneer or stockbroker should be ascertained, and order him to pay over the balance. It seems to me that the ordinary course of law would have to be followed—namely, an action commenced by the liquidator against the alleged agent (the auctioneer or stockbroker in the case I put) claiming this money as the money of the company, and then the auctioneer or stockbroker, as the case might be, would have to raise his contention that he was entitled to retain, out of the money in his hands, the remuneration which he claims. I therefore, without going at all into the merits of this case, am bound to find that I have no jurisdiction, and that I must dismiss the summons.

Solicitors: *Murray, Hutchins, Stirling & Murray; Sutton, Ommanney & Rendall.*

H. C. R.

In re COOLGARDIE GOLDFIELDS, LIMITED. *In re* CANNON, SON & MORTEN (Solicitors).

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Jan. 17, 26.

[1899 C. 00276.]

Stamp Act, 1891 (54 & 55 *Vict. c.* 39), *s.* 14—*Solicitor—Undertaking—Practice.*

On motions, which were acceded to by the Court, an undertaking was given at the bar by counsel for the respondents, a company, on the instructions of their solicitors, that unstamped documents tendered in evidence on behalf of the respondents should be duly stamped, which undertaking was not fulfilled.

The Court directed the order made on the motions to be drawn up without entering the unstamped documents, and made a four-day order on the solicitors to produce the documents to the registrar duly stamped.

On July 21, 1899, Hamilton and Fleming, two shareholders in the Coolgardie Goldfields, Limited, moved to rectify the register of members of that company by striking out their names on the ground that they had been induced to take their shares by misrepresentation. The applications were heard together and were successful. During the hearing some documents were tendered in evidence by counsel for the company which ought to have been and were not stamped. Counsel for the respondent company gave the undertaking of a member of the company's firm of solicitors to pay the stamp duties and penalties.

On July 25 a motion was made ex parte on behalf of the solicitor that he might be relieved from his undertaking on the ground that he had intended to give an undertaking for his clients, and did not intend to enter into a personal undertaking. That application was ordered to stand over for notice to be given to the company and to the Inland Revenue. In the meantime an order to wind up the company compulsorily on the ground of its being unable to pay its debts had been made.

Messrs. Hamilton and Fleming were unable to get the orders removing their names from the register of shareholders drawn up because the stamp duties and penalties had not been paid. They now moved that the orders made on July 21 to remove

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their names from the register of shareholders might be drawn up without reference to the unstamped documents, the company undertaking not to appeal, or in the alternative that the solicitor might be committed for contempt of Court in not having carried out his undertaking, or in the alternative that the solicitor might be ordered within four days of service to get the documents stamped.

Notice of the application had been served on the solicitor, the Commissioners of Inland Revenue, and the official receiver as liquidator of the company.

Martelli, for Hamilton and Fleming. It cannot be right that the applicants should be kept on the register of shareholders because some one else makes default in paying duties and penalties. I ask for some direction that will enable the registrar to draw the necessary order; if the official receiver will undertake not to appeal, it will be sufficient protection to the applicants to have the registrar directed to draw up the order without reciting the unstamped documents. Otherwise, I must ask for an enforcement of the undertaking either by an order to commit the solicitor, or at least by a four-day order on the members of the firm to fulfil the undertaking.

Hon. A. Russell, for the official receiver, undertook not to appeal.

M. Muir Mackenzie, for the solicitors. The undertaking was given by counsel at the bar. The solicitor did not understand that the undertaking would bind him or the members of his firm personally. So far as the undertaking was an undertaking by him, it was given under a mistake. The solicitor intended that the undertaking should be that of the company, whose directors were in court and had authorized the undertaking to be given; he understood the undertaking would have this effect only.

Vaughan Hawkins, for the Commissioners of Inland Revenue. The commissioners have no power to remit the duties; they are willing to remit the penalties. It is the duty of the Court to see that the revenue is not defrauded. In *Owen* v. *Thomas* (1)

(1) (1834) 3 My. & K. 353; 41 R. R. 88.

the Court refused to allow an order to be drawn up till duties were paid; and in *Nixon* v. *Albion Marine Insurance Co.* (1) the Court refused to hear an insurance action where the parties had agreed to treat the case as if a policy had been executed, when there was no stamped document in existence.

The old Court of Chancery always insisted that their own officer, a solicitor of the Court, should give an undertaking, when it was sought to put in evidence an unstamped document; though this was not in accordance with the letter of the Stamp Act, which could not be literally complied with in Chancery suits. And the Court has always jealously and strictly enforced the undertaking: *In re Ward.* (2)

M. Muir Mackenzie, in reply.

Jan. 26. COZENS-HARDY J., after stating the facts, continued:—Notwithstanding the express language of s. 14 of the Stamp Act, 1891, it is the settled practice to allow an unstamped document to be used upon the personal undertaking, not of the parties to the action, but of solicitors who are officers of the Court, to stamp it and to produce it so stamped before the order is drawn up. I have endeavoured to ascertain the origin of this practice. The earlier Stamp Acts, so far as my investigations have extended, do not contain any provision similar to s. 14 of the Act of 1891. The Stamp Act of 1854 (17 & 18 Vict. c. 83), only enacts in s. 27 that every instrument liable to stamp duty shall be admitted in evidence in any criminal proceeding, although it may not be properly stamped. But by s. 28 of the Common Law Procedure Act, 1854, which received the Royal assent two days later, it was enacted as follows: "Upon the production of any document as evidence at the trial of any cause, it shall be the duty of the officer of the Court whose duty it is to read such document to call the attention of the judge to any omission or insufficiency of the stamp; and the document, if unstamped, or not sufficiently stamped, shall not be received in evidence until the whole or (as the case may be) the deficiency of the stamp duty, and the penalty required by statute, together with the additional penalty

(1) (1867) L. R. 2 Ex. 338. (2) (1862) 31 Beav. 1, 8.

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of 1*l.*, shall have been paid." Sect. 29 gives certain consequential directions. These sections were repealed in 1870, and substantially re-enacted in s. 16 of the Stamp Act, 1870. This again was repealed and in substance re-enacted in 1891, the chief distinction being that the obligation now rests directly upon the judge, and not upon any officer of the Court. I am indebted to Mr. Lavie, the registrar, for a note of the case which I believe to be the origin of the settled practice to which I have referred. On July 20, 1855, a cause of *Jennings* v. *Christopher* came on before Sir John Romilly on motion for judgment, and the following is an extract from the registrar's minute, folio 218 :—

"Collins proceeds to shew his title. (The agreement referred to.)

"Mr. Roupell says it is not stamped.

"The solicitor tenders the money to the registrar, who protests.

"Court reads the Act" (Common Law Procedure Act, 1854 (17 & 18 Vict. c. 125), ss. 28, 29), "and is of opinion that, though under the clause in the Act making these sections applicable to all courts of civil jurisdiction, this Act is applicable to this Court, yet there is no officer of this Court now, unless it be the clerk of records and writs, who answers the description of the officer of Court whose duty it is to read the documents, &c. Certainly not the registrar.

"Mr. Blaxland, the solicitor for the plaintiff, undertaking that the proper stamp shall be paid and affixed, let this cause proceed."

And at the end of the entry relating to the cause are the following :—

"N.B.—See that memorandum is duly stamped before drawing up decree.

"N.B.—The memorandum was duly stamped before it was entered in the order."

It will be observed that the Court accepted the undertaking of the solicitor, without requiring any signature of the registrar's book or other document. The advantages of the practice are obvious. It is not always easy to settle at once what is the

amount of the stamp duty, and, moreover, it may well be that when the amount required is known the cash is not at the moment in court. It would be in the last degree inconvenient and undesirable to direct an action to stand over in the middle of the trial in order that a document might be stamped. The Court, therefore, accepts the undertaking of its own officer that the document shall be stamped before the order is drawn up as satisfying the obligations of the statute. The Court looks to its own officer, and leaves that officer to claim indemnity from his own client.

I am not aware of any difficulty having arisen until the present case. Sir John Romilly in 1862 refers to it as the ordinary course. See *In re Ward* (1), where he says: "The Court accepts the undertaking of solicitors . . . . to pay the penalty for not stamping an agreement and various other acts"; and he proceeds to say: "I am never informed whether they are performed or not, I have not the slightest doubt that they are performed in every case; but if it afterwards came to my knowledge that the act, without the performance of which the case could not have properly been heard, had not been performed, or that the money had not been paid, I should compel the solicitor, at the instance of anybody interested in the matter, to make good his undertaking or assertion, on the faith of which the Court had acted; it is no answer to say, that it was the duty of many other persons to look into the matter, and see that the act was duly performed." See also Seton on Decrees, 4th ed. p. 26.

In this state of circumstances it seems to me to be clear that an undertaking was given to the Court by the company's solicitors, acting through the member of their firm who was present in court. This is not seriously disputed, for the application to be relieved from the undertaking presupposes that the undertaking was given. I think it is of the utmost importance that such an undertaking given by officers of the Court should not be released without the consent of the person or persons for whose benefit the undertaking was given. Those persons in the present case are the Commissioners of Inland Revenue. They, through their counsel, state that they have no power to

(1) 31 Beav. 8.

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COOLGARDIE GOLDFIELDS, LIMITED, *In re.*

CANNON, SON & MORTEN (SOLICITORS), *In re.*

waive the stamping of the documents, although they can and will in the present case waive penalties, and they insist for the protection of the revenue that the undertaking given should be enforced. On the other hand, I think it is not just that the applicants, who have, by their own evidence, established a title to relief, should be prevented from obtaining relief by reason of the failure of their opponents or of their opponents' solicitors to stamp documents which were put in, not by the applicants, but by the opponents. If I make no order on the present motion, it may be that the applicants will have to pay several hundred pounds before they can get the order made by me in July last perfected. I think I shall be doing what is fair between the parties and right towards the Inland Revenue authorities by directing the order to be forthwith drawn up without entering the unstamped documents, the company undertaking to withdraw their appeals. I must order the solicitors upon their undertaking to cause these documents to be produced to Mr. King, the registrar, at his room, properly stamped, within four days after service upon them of this order. It will be stated on the face of the order that the Inland Revenue Commissioners agree to waive penalties, and I shall expressly reserve liberty to the commissioners to apply in case this order is not obeyed by the solicitors. The solicitors must pay the costs of the applicants of this motion.

Solicitors: *Morten, Cutler & Co.; Cannon, Son & Morten; Solicitor to Board of Trade; Solicitor to Inland Revenue.*

D. P.

COZENS-HARDY J.

1900

Jan. 24, 31.

In re NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION.

[0016 of 1900.]

Company—Alteration of Memorandum—Absence of Capital—Jurisdiction to Confirm Resolution—Companies (Memorandum of Association) Act, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 1—*Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-ss.* 1, 2, 3.

The High Court has jurisdiction to wind up a registered unlimited company which has no shares and no capital, and therefore has jurisdiction to sanction an alteration of its memorandum of association.

PETITION for the confirmation by the Court of a special resolution for altering the memorandum of association of the company.

The association was incorporated in 1876. It was registered as an unlimited company, and the memorandum of association contained three clauses: "1. The name of the company is the North of England Iron Steamship Insurance Association. 2. The registered office of the company will be situate in England. 3. The object for which the company is established is the mutual insurance of iron steamships insured with the company by members of the company."

The company had no shares and no capital. By the articles of association it was provided that every person should be a member of the company who in his own name, or in his name as agent, insured any ship in pursuance of the articles and rules of the company.

A special resolution had been passed and confirmed that the memorandum of association of the company should be altered in such a way as to enlarge the scope of its operations, and the company now asked the Court to sanction the alteration.

O. L. Clare, for the petitioners. Companies of a similar constitution to this have been wound up by the Court without any questions being raised, and we submit that there is jurisdiction to make the order. The difficulty arises from the

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circumstance that the company has no capital. By s. 1, sub-s. 1, of the Companies (Memorandum of Association) Act, 1890, the Court which has power to sanction an alteration of the memorandum is the Court which has jurisdiction to wind up the company. The Courts which have power to make winding-up orders are specified in s. 1, sub-s. 1, of the Companies (Winding-up) Act, 1890, which gives power to wind up all companies without distinction. Companies having no capital are not within sub-ss. 2 and 3; but that does not affect the general jurisdiction, although there might be a doubt which Court had jurisdiction. Any difficulty of that kind is removed by the power to transfer proceedings which is conferred by s. 3 of the Companies (Winding-up) Act, 1890.

If the Companies (Winding-up) Act, 1890, does not apply to this company, the old jurisdiction under Part IV. of the Companies Act, 1862, remains in force. The repeal of s. 81 by s. 33 of the Companies (Winding-up) Act, 1890, does not extend to companies which have no registered office in England or Wales, so the old jurisdiction is not entirely gone: Buckley on Companies, 7th ed. p. 701.

Cur. adv. vult.

Jan. 31. COZENS-HARDY J. read the memorandum of association of the company, and continued:—This complied strictly with s. 10 of the Companies Act, 1862. The company has no shares and no capital. It is, however, a company the winding-up of which is plainly contemplated by s. 79 of the Act of 1862, and under s. 81 of that Act the Chancery Division of the High Court had jurisdiction to wind it up. But by s. 33 of the Companies Act, 1890, s. 81 of the Act of 1862 is repealed, and s. 1 of that Act is substituted. That section is as follows: [His Lordship read the section.] The question arises whether there is now any Court competent to wind up a company which has no capital paid up or credited as paid up. Upon the whole, I have come to the conclusion that I cannot attribute to the Legislature the intention to render all companies formed under s. 9 or s. 10 of the Act of 1862 exempt from the jurisdiction of any Court, and to leave companies formed under s. 8 alone

liable to be wound up. Sect. 32, sub-s. 2, of the Companies (Winding-up) Act of 1890, which is as follows, "In Part IV. of the Companies Act, 1862, and in this Act the expression 'the Court' when used in relation to a company shall, unless the contrary intention appears, mean the Court having jurisdiction under this Act to wind up the company," assumes that Part IV. of the Act of 1862, which is headed "Winding-up of Companies and Associations under this Act," continues in full force. I think I am justified in holding that sub-s. 1 of s. 1 of the Companies (Winding-up) Act, 1890, defines the Courts which have jurisdiction to wind up *all* companies in England and Wales except so far as cut down by the following sub-sections, and that sub-ss. 2 and 3 apply only to companies formed under s. 8, and which, therefore, possess a capital. The result is that the High Court has jurisdiction to wind up the association, and, therefore, has jurisdiction to sanction an alteration of the memorandum of association.

The question of jurisdiction being settled, I feel no difficulty in confirming the special resolutions, the object of which is to enlarge the scope of the operations of mutual insurance.

The order, therefore, will be as prayed.

Solicitors: *Williamson, Hill & Co., for Ingledew & Fenwick, Newcastle-on-Tyne.*

H. C. R.

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1900

Jan. 31; *Feb.* 6.

D. *v.* A. & CO.

[1899 D. 2136.]

Practice—Undertaking to do an Act—Breach—Committal or Attachment—Service of Order containing the Undertaking—Solicitor—Rules of Supreme Court, 1883, *Order* XLII., *r.* 7; *Order* XLIV., *rr.* 1, 2.

On a motion for liberty to issue a writ of attachment against solicitors for breach of an undertaking, given by them and embodied in an order of the Court, it appeared that the order had not been served upon them:—

Held, that service of the order was not necessary; but that undertakings, whether positive or negative, must be enforced by committal and not by attachment.

MOTION.

The following statement of facts is taken from the judgment of Cozens-Hardy J.

On January 26 a motion was made by the plaintiffs in this action and in the matter of two solicitors who are themselves the only defendants to the action. After some discussion certain undertakings were given by the defendants, and the only order made was that the motion should stand over until the trial of the action without prejudice to any question as to costs or otherwise. The first part of the undertaking given by the defendants had reference to the non-disclosure of certain documents, and the next part was in the following words: "also undertaking on or before the 29th January, 1900, to deposit in the Central Office upon oath any papers or documents handed to them by Major and Mrs. D. or either of them, and any other papers or documents in their possession, custody, or power belonging to the estates of Major and Mrs. D. or either of them, and also copies of any entries in the books of the defendants (such entries to be made exhibits), and copies of any other documents in the possession, custody, or power of the defendants not deposited as hereinbefore provided relating to the business of Major and Mrs. D. or either of them"; and the plaintiffs were to be at liberty to inspect and peruse and to take copies of or extracts from any of the documents to be

deposited as thereinbefore provided as they might be advised at their expense. Certain documents were deposited by the defendants on oath on January 30. The affidavit was, however, clearly insufficient, and as the documents were required for the purpose of an examination in London on the 31st, the plaintiffs by special leave moved on the 31st that they might be at liberty to issue a writ of attachment against the defendants for breach of their undertaking contained in the order of January 26. The defendants, who are resident in Paris, complained that this application ought not to have been made, and they took, as they were entitled to take, several objections of a more or less technical nature to the regularity of the proceedings. It was ultimately arranged, without prejudice to any question, that the defendants should within a named time make a further affidavit, and it is therefore only necessary to consider the points raised with a view to deciding who should pay the costs of the motion.

Hon. E. C. Macnaghten, Q.C., and *Vaughan Hawkins*, for the motion.

Vernon R. Smith, Q.C., and *F. H. Maugham*, for the defendants. The motion is oppressive and should be refused. The order was not served on the defendants, and it is now settled that orders containing undertakings of an affirmative character —i.e., undertakings to do any particular act—must be served on the person who gave the undertaking: *Halford* v. *Hardy*. (1) The fact that a limit of time is fixed by this undertaking does not affect the question of service. Secondly, the notice of motion was not personally served on the defendants: it was only served on their solicitors on the record. Even if that would be regular in the case of a motion for attachment, a notice of motion for committal must be served upon the defendant personally: *Mander* v. *Falcke* (2); Annual Practice for 1900, pp. 599, 603, 604. Solicitors are entitled to as much notice as any other members of the public. Thirdly, the application ought to have been for committal, not for attachment. The old distinction that a man was committed for doing

(1) W. N. (1899) 243. (2) [1891] 3 Ch. 488.

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what he ought not to do and attached for not doing what he was ordered to do has been practically abolished by Order XLII., r. 7, but it never applied to undertakings. The remedy for breach of an undertaking is by committal: *In re Evans* (1), and the note to that case approved by Bowen L.J. (2)

[COZENS-HARDY J. referred to *Callow* v. *Young*. (3)]

Hon. E. C. Macnaghten, Q.C., in reply. We do not dispute the proposition laid down in *Halford* v. *Hardy* (4) that in ordinary circumstances there ought to be service of the order, but here there were special circumstances. There was no time to effect service, and the defendants admit that they had full information about the undertaking, so service was unnecessary: *United Telephone Co.* v. *Dale* (5); *Avery* v. *Andrews*. (6) There is no rule that personal service of a notice of motion for attachment is requisite: Annual Practice for 1900, p. 607; although it is so on motions for committal. But this application is, and properly so, for attachment. There is no authority for saying that undertakings must in all cases be enforced by committal. If this had been a breach of an order the appropriate remedy would have been by attachment, and the Court in enforcing undertakings is guided by the analogy of orders.

[*Vernon R. Smith, Q.C.*, referred to *Seaward* v. *Paterson*. (7)]

Cur. adv. vult.

Feb. 6. COZENS-HARDY J. stated the facts, and continued:— The defendants object (1.) that the order of January 26, which contained the undertaking, was not served upon them; (2.) that the notice of motion was not personally served upon them; (3.) that the proper remedy for the breach of their undertaking is by committal and not by attachment.

As to the first objection, I think it is not well founded. It is settled law that an order granting an injunction may be enforced by committal, although the order has not been served.

(1) [1893] 1 Ch. 252.
(2) Ibid. 266.
(3) (1886) 55 L. T. 543; W. N. (1886) 183, 209; (1887) 56 L. J. (Ch.) 690; 56 L. T. 147.
(4) W. N. (1899) 243.
(5) (1884) 25 Ch. D. 778.
(6) (1882) 51 L. J. (Ch.) 414; 30 W. R. 564.
(7) [1897] 1 Ch. 545.

It is sufficient if it be shewn that the defendant had notice of the order. Service of the order is a convenient mode of giving notice, but that is all. Notice may be given by telegram or otherwise: see *United Telephone Co.* v. *Dale*. (1) If this holds good where a hostile order has been made, it must equally hold good where the defendant has voluntarily given an undertaking. Indeed in such a case I think no notice at all is requisite, for, in the words of Chitty J. in *Callow* v. *Young* (2), "it is not necessary to shew that the person sought to be attached had knowledge of his undertaking. He must be presumed to have known that he had given his undertaking." Having regard to the settled practice of giving an undertaking in the terms of a notice of motion, it would be highly dangerous to hold that a defendant who had given an undertaking could disregard it unless and until the order was served. I do not think Kekewich J. intended to intimate a contrary opinion in *Halford* v. *Hardy*. (3)

As to the second objection, it is conceded that if committal is the proper remedy, personal service of the notice of motion is necessary.

It remains to consider the third objection. According to the old law, an order of the Court for the committal of the defendant was the proper remedy for the breach of an order to abstain from doing a certain thing. On the other hand, the non-compliance with an order to do a certain thing was punished by attachment, which was issued at the instance of the party aggrieved and at his own risk. The applicant had to prove personal service of the order on the party required to do the act, and also that default had been made. On production of the order, and on proof to the satisfaction of the proper officer that there had been due service and default made, the writ issued. It was not due service unless the order had a special indorsement, which contained the words, "if you neglect to obey this order you will be liable to be arrested under a writ of attachment": see Braithwaite's Record and Writ Practice, ed. 1858, pp. 166–7. This, which was the old law, has been

(1) 25 Ch. D. 778. (2) 55 L. T. 544.
(3) W. N. (1899) 243.

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materially altered by Order XLII., r. 7, which provides in effect that a judgment, whether its form be negative or affirmative, may be enforced either by attachment or by committal, and by Order XLIV., r. 2, which provides that no writ of attachment shall be issued without leave to be applied for on notice. In the present case, however, Order XLII., r. 7, does not apply, for there was no judgment or order upon the defendants to deposit documents. Their liability rested upon their undertaking. It is somewhat strange that there is no express authority as to what is the proper mode of enforcing an undertaking as distinct from an order. The question arose in *Callow* v. *Young*. (1) In that case a motion was made before Chitty J., on November 19, 1886, for leave to issue an attachment for breach of a negative undertaking, and leave was granted. It appears, however, from the *Weekly Notes*, 1886, p. 209, that the order was stopped on the ground that committal was the proper remedy, not attachment—a point which had not been taken in argument. The motion was brought on again on February 11, 1887. (2) Chitty J., after argument, gave leave to amend the notice of motion by asking in the alternative for committal, and directed the motion to be served again. I think this amounted to a decision that, where the undertaking is in form negative, attachment is not the proper remedy. Had there been an injunction instead of an undertaking, committal would, under the old law, have been the only remedy, and the decision may have proceeded on that ground. It does not seem necessarily to cover the case of an undertaking which is positive in form. On principle, however, I think that except in a case falling within Order XLII., r. 7, attachment can only issue for breach of an order of the Court commanding the respondents to do a certain act, and that in the numerous cases where there is a contempt, not arising from non-compliance with such an order of the Court, the only remedy is by committal. This is the view expressed in Mr. Lavie's memorandum printed in a note to the report of *In re Evans* (3), which is stated by Bowen L.J. (4) to represent the practice accurately.

(1) 55 L. T. 543.
(2) 56 L. T. 147.
(3) [1893] 1 Ch. 259.
(4) Ibid. 266.

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I adopt that view, and hold that an undertaking, whether positive or negative, must be enforced by committal and not by attachment. The result is, that in my opinion the third objection prevails. The notice of motion was wrong in asking for attachment instead of committal. The plaintiffs must pay the costs of the motion.

Solicitors: *Cheston & Sons; Dixon, Weld & Dixons.*

H. C. R.

COZENS-HARDY J.
1900
Feb. 10.

In re BROWN. LLEWELLIN *v.* BROWN.

[1897 B. 545.]

Administration—Lunatic—Charging Order—Funds in Court.

The rule of administration in Lunacy that the obligations of a lunatic are postponed to the needs of the lunatic does not affect funds in the High Court.

A judgment creditor of a lunatic obtained a charging order on funds of the lunatic in court. The balance only of the funds, after satisfying the charge, was transferred to Lunacy.

THIS was a creditor's action for the administration of the estate of Ralph Brown, who died in December, 1891, having made a will by which he gave all his property to his wife, Mary Blower Brown, his sole executrix. She survived her husband, and in April, 1894, was found by inquisition to be of unsound mind. The action was commenced in 1897. The defendants were Mary Blower Brown and John Hodgson, the committee of her estate. There were now in court to the credit of the action funds belonging to the testator's estate.

On November 2, 1899, an order was made in this action on the petition of W. T. Clutterbuck, a judgment creditor of Mary Blower Brown, charging her interest in the funds in court with the amount of the judgment debt and costs (73*l.* 3*s.*), and interest at 4 per cent. On November 28, 1899, the charging order was made absolute. Mary Blower Brown, suing by John Hodgson, her next friend, now petitioned for the transfer

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of the funds in court after payment of the testator's debts and the costs of the action to the account of Mary Blower Brown in Lunacy, notwithstanding the charging order.

Eve, Q.C., and *Hon. Frank Russell*, for the petition. When the Court of Lunacy has power over funds of a lunatic, it considers that the first duty of the Court is to see to the wants of the lunatic, and will only allow payment of the lunatic's creditors out of the lunatic's property if satisfied that there are sufficient assets left to provide properly for the lunatic himself: *In re Plenderleith* (1); *In re Winkle.* (2)

It must be admitted that till the property is under the control of the Court the legal remedies of a creditor are not taken away or interfered with by the fact that the debtor has become of unsound mind: *Horne* v. *Pountain* (3); *In re Leavesley.* (4)

But where this Court has got the control of funds it will apply the same principles as the Court of Lunacy does, and allow the Court of Lunacy to administer the funds.

Hon. E. C. Macnaghten, Q.C., and *Kenyon Parker*, for the plaintiff in the action.

T. L. Wilkinson, for the judgment creditor. Till a lunatic's funds are under the direct control of the Lunacy Court a creditor of the lunatic has all the rights and remedies against the debtor he would have against any other debtor: *Horne* v. *Pountain.* (3)

Eve, Q.C., in reply, referred to the case of *In re Clarke.* (5)

COZENS-HARDY J. I think the charging order must have full effect given to it. The cases of *In re Plenderleith* (1) and *In re Winkle* (2) seem to me to decide this and no more. When a fund is in court in Lunacy, or can only be got at through the Court of Lunacy, that Court will, in the first place, have regard to the necessities of the lunatic, and will only allow a judgment to have effect subject to making proper provision for

(1) [1893] 3 Ch. 332.
(2) [1894] 2 Ch. 519.
(3) (1889) 23 Q. B. D. 264.
(4) [1891] 2 Ch. 1.
(5) [1898] 1 Ch. 336.

the lunatic. But it seems to me long settled that the Lunacy Court cannot in any way interfere with the common law or statutory rights of a judgment creditor over funds which have not been brought within the control of the Lunacy Court; or, in other words, adopting the language of the Court in *In re Clarke* (1): "It is quite clear from Lord Eldon's observations in *Ex parte Hastings* (2) and *Ex parte Hall* (3), that the Court in Lunacy could not protect a lunatic from arrest under a ca. sa., and could not prevent a judgment creditor from issuing execution against his property if the creditor could reach it by ordinary writs of execution without interfering with the possession of an officer of the Court in Lunacy. This doctrine is as well settled now as it was then." Here I am only dealing with a fund standing to the credit of this action. The committee in Lunacy has not got possession of the fund. It is not subject to the Lunacy Court's jurisdiction. What is being done is not in any way interfering with an officer in Lunacy. What is asked is merely that effect shall be given strictly to the creditor's execution.

Solicitors: *Warriner & Co., for W. L. Moore, Newport, Monmouthshire; Thorneycroft & Willis, for Taynton, Sons & Siveter, Gloucester; Thomas White & Sons.*

(1) [1898] 1 Ch. 340. (2) (1807) 14 Ves. 182; 9 R. R. 272.
(3) (1821) Jac. 160.

D. P.

FARWELL J.

1900

Feb. 8, 9, 10.

POUEY *v.* HORDERN.

[1896 P. 2148.]

Power of Appointment—Exercise by Will—Foreign Domicil of Testatrix—Capacity to Dispose of Property.

A domiciled Frenchwoman having, under an English settlement, a special power of appointment by will over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France. The exercise of such a power is not a disposition of property belonging to the testatrix.

ACTION.

By a settlement of June 17, 1880, a sum of 4000*l.* was settled by Mary Hamilton Huber, an Englishwoman married to a French subject, upon trust to pay the income thereof to herself during her life for her separate use, and after her death in trust for all or any such one or more of her issue by any husband, and whether children or more remote issue born within legal limits, in such shares, manner, and form in every respect as she should by deed or will appoint, and in default of and subject to any such appointment in trust for such of her children by any husband, including her said three children as being sons or a son should attain the age of twenty-one years, or being daughters or a daughter should attain that age or marry under that age, and if more than one in equal shares.

The trustees of the settlement were English, and the trust funds were in England.

In 1890 Mrs. Huber, while at St. Jean de Luz, in France, executed a will in the English form, reciting the power of appointment under the settlement of 1880, and purporting to exercise it (inter alia) in favour of her daughter, the plaintiff. On the application of the plaintiff, Sir F. H. Jeune P. held that Mrs. Huber was a domiciled Frenchwoman, but that her will was a due execution of the power, and must be admitted to probate: *In the Goods of Huber*. (1)

In the present action the settlement was impeached on the

(1) [1896] P. 209.

ground that Madame Huber's husband was a Frenchman, and that, inasmuch as no settlement had been executed at the time of their marriage, she was bound by the French law as to community of goods, and could not dispose of the 4000*l*. His Lordship held that, in the circumstances, the settlement was valid, and the question was then argued whether the appointment was effective.

H. J. H. Mackay, for a daughter of Madame Huber to whom she had appointed nothing. Madame Huber had no power to disinherit her children. Assuming that the settlement of 1880 was valid, and the power of appointment well exercised, she was, nevertheless, bound by the French law. She was married to a French subject without a settlement, and by the provisions of Book III., tit. 5, ch. 2, of the Code Civil, which refers to the law of community of goods, she was deprived of the power to dispose of her property. At all events, she could not dispose of more than one-fourth: art. 913.

Hughes, *Q.C.*, and *E. J. Schuster*, for the plaintiff. This was a special power of appointment. The children only took under the settlement the interests which she chose to give them. The appointment is read into the settlement and becomes part of it. The French law only applies to property of which the parties are owners. This was not Madame Huber's property; it was property over which she only had a power of appointment: *In re Price* (1); *D'Huart* v. *Harkness* (2); Dicey's Conflict of Laws, pp. 697, 701. The only real difficulty lay in the form of the will, and that has been removed by the decision of Sir F. H. Jeune.

Bramwell Davis, *Q.C.*, *J. G. Wood*, and *S. O. Buckmaster*, for other parties.

Cur. adv. vult.

Feb. 10. FARWELL J. I have already held that the settlement of June 17, 1880, was a valid settlement giving Madame Huber a life interest with remainder to her issue as she should appoint, and in default of appointment for her children at

(1) Ante, p. 442. (2) (1865) 34 Beav. 324.

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twenty-one or marriage. This is an English document to be construed according to English law. Madame Huber, being a domiciled Frenchwoman, made her will in France on June 2, 1890, and died on May 7, 1895. Her will has been admitted to probate in this country after litigation: *In the Goods of Huber*. (1) This grant of probate is conclusive that the instrument proved is the will of the testatrix, but is not conclusive as to its construction, or the rights to the property disposed of by the will: *D'Huart* v. *Harkness*. (2) It is contended that the testatrix could not by French law dispose of property at all, or at any rate could not, having regard to the number of her children, dispose of more than one-fourth. But the power in this case is a special power, and the execution of such a power does not bring the appointed property into the will of the appointor at all, but operates as a nomination of the persons whose names are to be inserted in the settlement as entitled in remainder in lieu of the power of appointment. There is, therefore, no disposition of property belonging to the testatrix.

I desired to make some search to see if I could find any authority against the opinion that I formed yesterday in favour of the will; but, so far from having discovered one, I find that Kay J., and the learned counsel who argued the case of *In re Kirwan's Trusts* (3), all treated the will as a good execution of the power, which in that case was a special power, although the learned judge held that the will being ambulatory became a fraud on the power by subsequent events. In my opinion this appointment is perfectly good. Further, it appears from the report of *In re Price* (4), that Stirling J. came to a similar conclusion in a similar case where the power was general. If the foreign testatrix can exercise a general power, a fortiori can she exercise a special power. The distinction between power and property is well settled, and it is really not relevant to the consideration of the execution of a power to inquire whether the donee of the power can dispose of his property, unless of course there be absolute incapacity to execute any document arising from lunacy or the like. Thus it has been

(1) [1896] P. 209.
(2) 34 Beav. 324.
(3) (1883) 25 Ch. D. 373.
(4) Ante, p. 442.

held by the Court of Appeal and Jessel M.R. that an infant can exercise by deed a general power of appointment over personalty—at least, if it be not limited to himself in default of appointment, *In re D'Angibau* (1), although he can of course have no disposing capacity over his own property; because the authority to dispose proceeds from the donor of the power and not from the donee. It follows, therefore, that the execution of any power of appointment validly created and given to a foreigner is in no way affected by any disability which he or she may be under to dispose of his or her own property by the laws of his or her domicil; but different considerations would arise if the appointee predeceased the appointor by will, and the effect of the appointment was held to be to take the appointed property out of the instruments creating the power for all purposes and to make it part of the property of the appointor. I therefore agree with Stirling J., and on this ground also hold the appointment good.

Solicitors: *A. Herbelet; A. W. Burn; Gerrish & Foster; Crosley & Burn.*

(1) (1880) 15 Ch. D. 228.

H. C. R.

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Jan. 19, 20, 22.

PANNELL *v.* CITY OF LONDON BREWERY COMPANY.

Landlord and Tenant—Forfeiture of Lease—Breach of Covenant—Notice bad in part—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict.* c. 41), *s.* 14.

A notice under s. 14 of the Conveyancing Act, 1881, referring to several distinct alleged breaches of covenant is not invalidated in toto because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely on them.

Horsey Estate, Limited v. *Steiger*, [1899] 2 Q. B. 79, and *In re Serle*, [1898] 1 Ch. 652, distinguished.

By a lease dated October 10, 1868, John Roycroft, the owner in fee, at the request and by the direction of Edward George Chapman, the builder, demised to the predecessors in title of the defendants the City of London Brewery Company, Limited, a piece of ground in the parish of St. Giles, Camberwell, Surrey, together with the messuage or tenement and buildings then being erected thereon, and which were then intended to be and were afterwards used as a tavern or public-house called "The Denmark," to hold the same premises for the term of ninety-nine years from September 29 at a peppercorn rent for a term and thenceforth at the yearly rent of 90*l*. The lease contained covenants by the lessee that he, his executors, administrators, and assigns, would during the term contribute a fair proportion towards the expense of making, repairing, and cleansing all party and fence walls, and at his or their own costs and charges well and substantially repair, maintain, and keep the said demised premises with the appurtenances in such good and substantial repair as should be necessary for the occupation of a tenant at a rack-rent. He also entered into a covenant to paint, which by a subsequent deed was altered so as to be a covenant to paint once in every four years. And in the lease there was a proviso for re-entry by the lessor, his heirs or assigns, in case of failure to observe or perform any of the lessee's covenants.

The plaintiff, who had obtained a conveyance of the lessor's

interest in the property, on January 31, 1899, served on the defendant company a notice under s. 14 of the Conveyancing and Law of Property Act, 1881, of alleged breaches of the lessee's covenants to repair and paint, and requiring remedy of the breaches and payment of compensation, and on June 5, 1899, the plaintiff brought the present action against the company and its tenants for recovery of possession of the demised premises. The defences raised by the defendants were: that there had been no breach of covenant; that the breaches, if any, had been waived; that, having regard to the form of the notice, the notice was bad in toto.

At the trial the plaintiff failed to shew to the Court's satisfaction that there had been any breach of the covenant to paint.

H. Terrell, Q.C., and *Gilks*, for the plaintiff. The lessee's covenants to repair have been broken, and the defendants not having complied with the notice served under s. 14, sub-s. 1, of the Conveyancing Act, 1881, the plaintiff is entitled to recover possession. Assuming that the covenant to paint has not been broken, the notice is not bad because it refers to alleged breaches which have not taken place, so long as it refers to breaches which have actually occurred. It was held, before the Conveyancing Act, 1892, that "compensation," in s. 14 of the Act of 1881, did not include the cost of employing a solicitor and surveyor in preparing the notice: *Skinners' Co.* v. *Knight.* (1) But where a notice given before the Act of 1892 was otherwise good, it was held not to be invalidated by the insertion therein of a claim for payment of surveyor's fees and solicitor's charges: *Lock* v. *Pearce.* (2)

Astbury, Q.C., and *G. F. Mortimer*, for the defendant company. There has been no breach of the covenant to paint, and therefore, even if the covenant to repair has been broken, the extension of the notice to alleged breaches of covenant which have never taken place makes the notice bad in toto: *Horsey Estate, Limited* v. *Steiger.* (3) In that case it was clearly laid

(1) [1891] 2 Q. B. 542. (2) [1893] 2 Ch. 271.
(3) [1899] 2 Q. B. 79.

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down that the notice must be such as to give the tenant precise information of what is alleged against him and what is demanded from him, and that where a notice in respect of an act of the lessees which gave the lessors the right to enter extended also to an alleged breach of covenant for non-repair which could not be relied on, the inclusion of the latter invalidated the former part of the notice, because so long as the breach for non-repair was relied on it was impracticable to consider whether there was any answer as to the other matter, and whether as to this the tenants could make terms with the lessors.

[They also referred to *In re Serle*. (1)]

H. Terrell, Q.C., in reply. The point was clearly decided in *Lock* v. *Pearce* (2), which was not cited either in *In re Serle* (1) or in *Horsey Estate, Limited* v. *Steiger*. (3) In the case last mentioned the decision was that the notice was not served a reasonable time before the action was commenced; and in *In re Serle* (1) the decision was on a different point, namely, whether the alleged breaches were sufficiently particularised.

G. Cave, and *R. Edmondson*, for the other defendants.

BUCKLEY J. The question to be determined is whether the plaintiff has made out a case entitling him to re-enter under the proviso for re-entry contained in the lease. [His Lordship then referred to the condition of the demised premises at the time when the lease was granted, and read the material parts of the lease, and proceeded as follows:—]

I find that the plaintiff has failed to prove that there was any breach of the covenant to paint once in every four years. On the contrary, I find that the defendants have proved that the premises have been properly painted during the last four years. One of the matters included in the notice given on January 31, 1899, was this: "Rub down, repair, and paint, with two coats, all external wood, iron and other work." I find as a fact that the lessor was wrong in requiring the lessee

(1) [1898] 1 Ch. 652. (2) [1893] 2 Ch. 271.
(3) [1899] 2 Q. B. 79.

to do that, because there had been no breach of that covenant. Then Mr. Astbury, for the defendant, argued that the notice, having been bad in one particular, was bad altogether.

The argument on this part of the case amounts to this—that if a lessor gives his lessee notice of, say, three breaches, as to two of which he is right and as to the third of which he is wrong, any proceedings which he may take upon that notice must be defeated because the notice is bad as a whole. The first observation on that is, that if that were the law it would be very inconvenient, as the result would be that every lessor must, for his own protection in case of several breaches of covenant, serve a separate notice with regard to each breach. If there were three alleged breaches, he would have to serve three notices, so that if told that his third notice was bad he might reply, "That may be so, but numbers one and two are good," and would succeed. It would be a very inconvenient state of the law if that were so, and on that ground I should not suppose that by the Act of 1881 it was intended to make any such provision. Again, this occurs to me—that before the Act of 1881, under the old law, when a lessor was bringing his action of ejectment for breach of covenant, the first thing the defendant was entitled to was to have particulars of the breaches alleged. And if the lessor gave particulars of three alleged breaches, and if two were breaches and the third was not, what would have been the result? At the trial of the action the defendant would succeed as regards number three; but the lessor, succeeding as to numbers one and two, would of course be entitled to his judgment for ejectment. One would suppose that the statute passed in that state of things operated in favour of the tenant to this extent—that the tenant is now entitled not only to particulars of breaches in an action brought, but also to particulars of breaches long before action brought. The Act of 1881 gives him this benefit—that if within a reasonable time he remedies the breaches which are the subject of the notice, then he defeats the lessor's right to re-enter. But suppose the notice contains particulars of an alleged breach which is not a breach, why should that be more than matter of defence? Why should it go to defeat the notice as a whole?

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There does not seem to be any obvious reason why that should be so, and therefore primâ facie I should have thought that if the notice required by the statute was good as to part, and sustained as to that part, and was bad as to the rest, the lessor would be entitled to succeed in his action. That being what one would suppose to be reasonable, let us see what the Act says. Sect. 14, sub-s. 1, of the Conveyancing Act, 1881, provides as follows: "A right of re-entry or forfeiture under any proviso or stipulation in a lease, for a breach of any covenant or condition in the lease, shall not be enforceable, by action or otherwise, unless and until the lessor serves on the lessee a notice specifying the particular breach complained of and, if the breach is capable of remedy, requiring the lessee to remedy the breach, and, in any case, requiring the lessee to make compensation in money for the breach, and the lessee fails, within a reasonable time thereafter, to remedy the breach, if it is capable of remedy, and to make reasonable compensation in money, to the satisfaction of the lessor, for the breach." If a lessor gives a notice specifying two breaches, and specifying a third thing which is not a breach, he has given notice specifying the breach complained of. He has done that and more. He has not only done that which the statute says he must do, but he has done something in addition. He is, therefore, within the words of the Act; and, for the reasons I have given, it seems to me that a notice which contains too much is within the reasoning of the Act.

Now I have to look at the authorities to see whether this matter has been the subject of decision. I find that under the Act of 1881 the lessor was not entitled to require the lessee to pay him the costs and expenses of employing a solicitor, surveyor or valuer. That has been altered by s. 2, sub-s. 1, of the Conveyancing and Law of Property Act, 1892 (55 & 56 Vict. c. 13); but at the date of the two authorities to which I am going first to refer the Act of 1892 had not been passed.

In *Skinners' Co.* v. *Knight* (1) it was decided in the Court of Appeal that "compensation" for breach does not include the costs incurred by the lessor in consulting and employing a

(1) [1891] 2 Q. B. 542.

solicitor and surveyor, and that case, no doubt, gave rise to the Act of 1892.

In *Lock* v. *Pearce* (1) a lessor had, by his solicitors, served a notice which so far as is material referred to particular breaches of covenant, and then proceeded as follows: "And, as such solicitors and agents as aforesaid, we also require you to forthwith pay to the said Arthur Pearce the sum of 2*l.* 2*s.* for the expenses which have been incurred by the said Arthur Pearce for surveyor's fees and solicitor's charges by reason of such breaches of covenant as aforesaid; and we hereby give you further notice that if you make default in remedying such breaches of covenants in manner above mentioned, or in making the compensation hereby required, the said A. Pearce will enter and take possession of the said messuage dwelling-house and premises." That is to say, it was a notice that, unless the tenant paid something which the tenant was not liable to pay to the lessor, the lessor would re-enter. That was too large a notice. In the argument of the counsel for the appellant the point was raised to this extent (2): "It is true that the notices asked for 2*l.* 2*s.* for the surveyor's and solicitor's charges; but that claim was illegal, as was held in *Skinners' Co.* v. *Knight* (3), and must, therefore, be left out of consideration." It seems to me that that was the view which was adopted by the Court, because the Court held that the notice was a good notice, notwithstanding that it contained a demand for payment of something which the lessee was not liable to pay. The relevant words on this point in the judgment of the present Master of the Rolls (then Lindley L.J.) are (4): "It is true that he"—that is, the lessor—"asked for 2*l.* 2*s.* for the surveyor's fees, and there is a case which decides that he could not recover them; but in fact he told them what compensation he wanted. The notices are as good as any notice could possibly be." I do not say the point was very fully argued in that case. I do not think it was, and, beyond the passage which I have read, I do not find it discussed in the arguments of counsel. But there I have a decision of the

(1) [1893] 2 Ch. 271.
(2) Ibid. 273.
(3) [1891] 2 Q. B. 542.
(4) [1893] 2 Ch. 280.

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Court of Appeal that a notice which requires a lessee to do something which the lessee is not compellable to do is otherwise good. But then it is said that in *Horsey Estate, Limited* v. *Steiger* (1) the contrary was decided, and, if the contrary was decided, of course I am bound by the decision. In that case there was a proviso for re-entry for two causes, either for breach of covenant, or, if the lessees should, amongst other things, enter into liquidation. The original lessees were two, one a natural person and the other a joint stock company, and the lease was assigned to a natural person and to a joint stock company. The assignee company went into liquidation, and the Court held that the liquidation in question was a liquidation within the proviso for re-entry in the lease, and the question was whether the notice was good. Now, the notice alleged as grounds the voluntary liquidation and also breaches of covenant to repair which were of an extensive character, and it required the defendants to make compensation for those two things. The notice, therefore, was addressed to two totally different subject-matters—one the liquidation of the company, the other breaches of covenant to repair. What took place was this. The notice having been given on November 2, the proceedings in the action were commenced on November 4, and one point in the case was that a reasonable time had not been given in order to allow of compliance with the notice. The Lord Chief Justice gave judgment in the Court of Appeal, and upon this point what he said is to be found on pp. 91 and 92. He first gave reasons for holding that, in the circumstances of that case, before commencing proceedings to obtain possession on the ground of liquidation it was necessary to give notice as regards the liquidation. The case with reference to the breaches of covenant to repair was given up, and therefore the liquidation was relied upon, and not the breaches of covenant to repair. The Lord Chief Justice said (2): "In the first place, if the entering upon liquidation had alone been put forward, the defendants would have had the opportunity of considering whether they had any answer, and, if not, whether they could make terms with the plaintiffs, but this was im-

(1) [1899] 2 Q. B. 79. (2) [1899] 2 Q. B. 92.

practicable so long as the claim for breach of covenant to repair was made. Again, if non-repair was alone relied on, the defendants might possibly, by offer of compensation accompanied by undertaking to repair have made terms with the plaintiffs." The reasoning there is as to the contents of the notice. Then his Lordship goes on to deal with another matter: "Further, the statute clearly contemplates that a reasonable interval shall elapse after service of notice and before action. Can two days' notice be said, in all the circumstances, to be a reasonable notice? I think not." That latter reasoning is addressed, not to the contents of the notice, but to the validity of the proceedings based on the notice, which is a totally different thing. Having, then, mentioned the two things—the one the contents of the notice, and the other the proceedings based on the notice—his Lordship said: "On the whole, therefore, I am of opinion that the notice was bad and did not comply with the condition precedent to action within s. 14 of the Act of 1881." I read those words to mean, and it seems to me they must mean, not that the notice was bad, but that the proceedings on the notice were bad, because that was the last matter to which his Lordship had referred in dealing with the question of reasonable interval, and you can make his previous reasoning consistent with that if you read it as having been addressed to those matters. There were two matters—liquidation one, breach of covenant the other—and it was held that the defendants ought to have had a reasonable time to comply with respect to both of them; and although the case had been thrown up with regard to the breaches of covenant to repair, and there was left only the question of liquidation, the tenant could not tell that that was going to be done; therefore, upon that ground also, it was held that sufficient time had not been allowed. I do not, therefore, read the decision of the Appeal Court in *Horsey Estate, Limited* v. *Steiger* (1) as being in conflict with the decision in *Lock* v. *Pearce* (2), which is not cited in *Horsey Estate, Limited* v. *Steiger*. (1) It appears to me that the decision of the Appeal Court in the last-mentioned case comes only to this, and can

(1) [1899] 2 Q. B. 79. (2) [1893] 2 Ch. 271.

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be supported entirely only upon this—that having regard to the very short time allowed between the notice and the commencement of the proceedings, the proceedings on the notice were bad; not necessarily that the notice itself was bad.

It appears to me that the decision of Kekewich J. in *In re Serle* (1) is not a decision on the point of law before me. That was a case of a notice containing insufficient particulars, which is another matter altogether.

In my judgment, the notice in the present case is not bad on the ground that it contains, amongst other things, a demand that the painting shall be done, and therefore, treating the notice as a good one, it is necessary for me to consider the other matters in the case.

[His Lordship then referred to the evidence in the case as to the alleged breaches of the covenant to repair, and held that there was no breach on which the plaintiff could rely. He therefore dismissed the action with costs.]

Solicitors for plaintiff: *Moon, Gilks & Moon.*

Solicitors for defendants: *Western & Sons; Hulberts, Hussey & Metcalfe; R. Horner Hargreaves.*

(1) [1898] 1 Ch. 652.

F. E.

STEPHENSON *v.* YORKE.

BUCKLEY J.

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Feb. 8.

[1899 S. 1081.]

Middlesex Registry—Rectification of the Register—Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 *Vict. c.* 64), *s.* 1—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 95—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 7, *sub-s.* 2.

Where a Court of competent jurisdiction has decided that a person is entitled to land registered under the Middlesex Registry Acts, and as a consequence of the decision is of opinion that a rectification of the register is required, the Court may not only declare that the register ought, but may also order it, to be rectified.

THE plaintiff was the owner of two houses, being respectively Merv Lodge, Holland Park Avenue, in the county of London, and No. 30, Pemberton Gardens, St. John's Park, Highgate, in the same county, the former being held under a lease granted in 1852, and the latter under a lease granted in 1880.

From 1880 the plaintiff occupied No. 30, Pemberton Gardens as her residence, but for many years prior to the action she had sub-let Merv Lodge. From 1883 she employed a solicitor to collect the rent of Merv Lodge, and, after paying thereout the rents of both houses and an annual subscription, to pay her the balance; and she deposited with him, as her solicitor and for safe custody, the title-deeds of both the houses.

He accounted for the rent up to Christmas, 1896, the rent for that date being accounted for in June, 1897. After that date he failed to account, notwithstanding several applications, and ultimately disappeared. It was discovered that two documents, both dated September 24, 1887, had been registered in the Middlesex Registry, one purporting to be an assignment by the plaintiff to the solicitor of Merv Lodge, and the other an assignment by her to him of the other house. Two mortgages by demise of the two houses, dated August 20 and 22, 1898, to the defendant Yorke from the solicitor, had been executed and registered in the Middlesex Registry, and Yorke

BUCKLEY J. 1900 STEPHENSON v. YORKE.

held the title-deeds of the houses. The plaintiff brought an action against Yorke and the solicitor, alleging, inter alia, that she had never sold or agreed to sell the houses or either of them to the latter, and had never executed any assignment to him, and that the deeds of September 24, 1887, were not her deeds; and she claimed (1.) a declaration that she was entitled in possession, free from incumbrances, to the houses; and (2.) a declaration that neither of the defendants was entitled, as against her, to any estate, interest, or charge in or on the houses, or either of them.

The action came on for trial as against Yorke, and on motion for judgment against the other defendant, who had not entered an appearance in the action. Yorke submitted to judgment in the terms of agreed minutes containing a proposed declaration "that the registration in the Middlesex Registry of the said two assignments and the said two mortgages respectively ought to be vacated (but as to the said mortgage of August 22, 1898, so far only as relates to the premises No. 30, Pemberton Gardens) and let the register be rectified accordingly."

J. K. Young, for the plaintiff. The Court can order the register to be rectified. Although North J. in *Gibbs* v. *Sidney* (1) held that he could not make an order to rectify, jurisdiction has since been given by s. 1 of the Land Registry (Middlesex Deeds) Act, 1891, and s. 95 of the Land Transfer Act, 1875. [He also referred to the Land Transfer Act, 1897, s. 7, sub-s. 2, and to Seton on Judgments, 5th ed. p. 1921, stating that the reference there should be to 54 & 55 Vict. c. 64. (2)]

G. R. Northcote, for the defendant Yorke.

(1) W. N. (1883) 148; 49 L. T. 132.

(2) The provisions referred to are as follows:—

Land Registry (Middlesex Deeds) Act, 1891 (54 & 55 Vict. c. 64), s. 1: "The Middlesex Registry shall be transferred to the Land Registry established under the Land Transfer Act, 1875, and shall form part of that office and be conducted by the registrar of that office accordingly, and all powers and indemnities subsisting and all penalties imposed for the purposes of the Land Transfer Act, 1875, shall be available for the purposes of the Middlesex Registry Act, 1708, and the Middlesex Registry Act, 1891."

Land Transfer Act, 1875 (38 & 39 Vict. c. 87), s. 95: "Subject to any

BUCKLEY J. Having regard to the decision of North J. in *Gibbs* v. *Sidney* (1), the Court certainly has power to declare that the registration ought to be vacated. The only question, therefore, is whether in the present case I ought to go further and order the register to be rectified. Having regard to the three sections referred to, I think that, in a proper case, the Court now has power to direct that the register shall be rectified by vacating the existing registration, and I make the order, in the terms of the minute, as asked.

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Solicitor for plaintiff: *Pasco Daphne, for L. Hill, Margate.*
Solicitor for defendant Yorke: *W. H. Hudson.*

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estates or rights acquired by registration in pursuance of this Act, where any Court of competent jurisdiction has decided that any person is entitled to any estate, right, or interest in or to any registered land or charge, and as a consequence of such decision such Court is of opinion that a rectification of the register is required, such Court may make an order directing the register to be rectified in such manner as it thinks just."

Land Transfer Act, 1897 (60 & 61 Vict. c. 65), s. 7, sub-s. 2: "Provided that where a registered disposition would if unregistered be absolutely void, or where the effect of such error, omission or entry," [as mentioned in sub-sect. 1] "would be to deprive a person of land of which he is in possession, or in receipt of the rents and profits, the register shall be rectified and the person suffering loss by the rectification shall be entitled to the indemnity" [by the Act provided].

(1) W. N. (1883) 148; 49 L. T. 132.

F. E.

C. A. 1900 Feb. 28.

LUDINGTON CIGARETTE MACHINE COMPANY *v.* BARON CIGARETTE MACHINE COMPANY.

[1899 L. 713.]

In re PITT'S PATENT, No. 9858 OF 1892.

[1899 P. 0114.]

Practice—Patent Action—Petition for Revocation—Liberty to apply for Leave to Amend by Disclaimer—Conditions to be Imposed—Form of Order—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

The owners of a patent for a machine having brought an action for its infringement, the defendants presented a petition for its revocation. The plaintiffs then asked for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer:—

Held, that, under the special circumstances of the case, the Court, in giving the liberty asked for, ought to impose the condition (similar to that which was imposed by the House of Lords in *Deeley* v. *Perkes*, [1896] A. C. 496, 500; 13 Rep. Pat. Cas. 581) that the plaintiffs should not bring or maintain any action for infringement of the patent in respect of any machines or parts of machines made prior to the date of the order.

In *Deeley* v. *Perkes* the House of Lords did not lay down any general practice as to the conditions to be imposed in such cases, but imposed that condition by reason of the peculiar circumstances of that case.

APPEAL against an order made by Kekewich J. giving liberty to the plaintiffs to apply at the Patent Office for leave to amend by way of disclaimer the specification of a patent of which they were the assignees.

The patent was granted on June 26, 1892, to S. Pitt for "Improvements in Cigarette Machines." By the complete specification the inventor made twenty-two claims.

On March 29, 1899, the plaintiffs commenced the above action, alleging that the defendants had infringed the patent, and claiming an injunction to restrain them from so doing. They claimed also damages or an account of profits, and the delivery up or destruction of infringing machines.

By their defence the defendants denied infringement, and alleged that the patent was invalid.

On September 22, 1899, the defendants, with the sanction of the Attorney-General, presented a petition for the revocation of the patent, on the grounds that Pitt was not the true and first inventor, and that the alleged invention was not new, or useful, or the proper subject-matter for a patent.

On November 8, 1899, the plaintiffs issued a summons by which they asked for liberty to apply at the Patent Office for leave to amend the specification of the patent by way of disclaimer, and for liberty after that amendment had been made to amend their statement of claim so as to limit the action to the amended specification.

The plaintiffs proposed to disclaim twenty of the twenty-two claims contained in the specification.

Kekewich J. on December 2, 1899, gave liberty to the plaintiffs to apply for leave to amend the specification of their patent by way of disclaimer; liberty to the defendants to amend their petition for revocation, and the particulars of objections delivered therewith, within twenty-one days from the amendment of the specification; liberty to the plaintiffs to amend their statement of claim, and the particulars of breaches delivered therewith, within twenty-one days from the amendment of the specification; and liberty to the defendants to amend their defence and particulars of objections delivered therewith within ten days from the delivery of the amended statement of claim. And it was ordered that the plaintiffs should not threaten any persons with legal proceedings under the patent until after the amendment should have been made; that the plaintiffs should not bring or maintain any action for infringement of the patent in respect of any machines or parts of machines made prior to the date of this order; and that the defendants' costs of the action and of the petition, including the costs of the present applications, "save so far as the same could be utilized for the purposes of the action and petition respectively after the amendment of the specification," should be borne by the plaintiffs in any event.

The learned judge was of opinion that *Deeley* v. *Perkes* (1) applied, and that the House of Lords had there laid down the

(1) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.

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general practice as to the conditions which should be imposed in giving liberty in such cases to apply for leave to amend a specification.

The plaintiffs appealed. (1)

(1) By the Patents, &c., Act, 1883, s. 18, "(1.) An applicant or a patentee may, from time to time, by request in writing left at the Patent Office, seek leave to amend his specification, including drawings forming part thereof, by way of disclaimer, correction, or explanation, stating the nature of such amendment and his reasons for the same.

"(2.) The request and the nature of such proposed amendment shall be advertised in the prescribed manner, and at any time within one month from its first advertisement any person may give notice at the Patent Office of opposition to the amendment.

"(3.) Where such notice is given the comptroller shall give notice of the opposition to the person making the request, and shall hear and decide the case subject to an appeal to the law officer.

"(4.) The law officer shall, if required, hear the person making the request and the person so giving notice, and being in the opinion of the law officer entitled to be heard in opposition to the request, and shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

"(5.) Where no notice of opposition is given, or the person so giving notice does not appear, the comptroller shall determine whether and subject to what conditions, if any, the amendment ought to be allowed.

"(6.) When leave to amend is refused by the comptroller, the person making the request may appeal from his decision to the law officer.

"(7.) The law officer shall, if required, hear the person making the request and the comptroller, and may make an order determining whether, and subject to what conditions, if any, the amendment ought to be allowed."

"(10.) The foregoing provisions of this section do not apply when and so long as any action for infringement or other legal proceeding in relation to a patent is proceeding."

Sect. 19: "In an action for infringement of a patent, and in a proceeding for revocation of a patent, the Court or a judge may at any time order that the patentee shall, subject to such terms as to costs and otherwise as the Court or a judge may impose, be at liberty to apply at the Patent Office for leave to amend his specification by way of disclaimer, and may direct that in the meantime the trial or hearing of the action shall be postponed."

Sect. 20: "Where an amendment by way of disclaimer, correction, or explanation, has been allowed under this Act, no damages shall be given in any action in respect of the use of the invention before the disclaimer, correction, or explanation, unless the patentee establishes to the satisfaction of the Court that his original claim was framed in good faith and with reasonable skill and knowledge."

By the Patents, &c., Act, 1888 (51 & 52 Vict. c. 50), s. 5, "For sub-s. 10 of s. 18 of the principal Act the following sub-section shall be substituted, namely:—

"(10.) The foregoing provisions of this section do not apply when, and so long as any action for infringement or proceeding for revocation of a patent is pending."

On the hearing of the appeal some further affidavits were by the leave of the Court admitted for the purpose of shewing whether there were any special circumstances in the case.

From these affidavits it appeared that during and since 1896 the defendants had manufactured and sold a number of machines, of a description which was alleged by the plaintiffs to be an infringement of their patent, and that these machines were being worked by the purchasers thereof; that these machines were sold for prices varying from 1100*l.* to 1500*l.* each, but that that part of the whole machine which was covered by those two of the claims contained in the plaintiffs' specification which they proposed to retain would cost not more than 2*l.* to make for each machine. There was also evidence that some of the defendants' customers who had purchased machines from them, or to whom machines had been let on hire, had declined to pay to the defendants the amounts due from them in respect of instalments of purchase-money or rent because of the action taken by the plaintiffs.

In the opinion of the Court the evidence also shewed that the plaintiffs had never made any use of their patent in England.

Bousfield, Q.C., *Lewis Edmunds, Q.C.*, and *J. C. Graham*, for the plaintiffs. It is submitted that the learned judge was in error in supposing that the House of Lords intended in *Deeley* v. *Perkes* (1) to lay down a general practice. The circumstances of that case were very peculiar. An order had already been made for the revocation of the patent there in question, and that order had been in force for a year and a half. It was because of the peculiar circumstances that the condition was imposed. It would be contrary to the usual practice to impose such a condition in the present case, in which the circumstances are in no way special: *Bray* v. *Gardner* (2); *Hopkinson* v. *St. James and Pall Mall Electric Light Co.* (3); *In re Chatwood's Patent.* (4) The present case is distinguishable

(1) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.
(2) (1887) 34 Ch. D. 668; 4 Rep. Pat. Cas. 40.
(3) (1893) 10 Rep. Pat. Cas. 46.
(4) (1899) 16 Rep. Pat. Cas. 370.

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from *Deeley* v. *Perkes*. (1) There the patent was for a gun; here it is for a machine which is to be used for making cigarettes. A gun is not used for the purpose of producing other articles. The defendants and their customers ought not to be allowed to go on using their machines, and thus to continue infringing the patent after the specification has been amended. If a machine is an infringement of the good claims after the bad claims have been struck out, why should the defendants be allowed to go on using it? The object of these sections was in effect to make a patent which had claims both good and bad severable, so that it should be valid as to the good claims. The question of past infringement should be left to be governed by s. 20. The power of the Court under s. 19 to impose conditions arises only when litigation is pending. If there were no petition for revocation the plaintiffs could discontinue their action, and thus escape from s. 19. They could then apply at the Patent Office for leave to amend, and, if leave were given, s. 20 would apply; and, if they could in a subsequent action for infringement shew that their original claims were made "in good faith, and with reasonable skill and knowledge," they would escape the condition imposed by s. 20. But the plaintiffs are willing to submit to that condition, and to relinquish their right to prove good faith, &c. And for the future they are willing to grant the defendants licences to use the machines which they have made, at a reasonable royalty, or in the alternative that the defendants' customers shall take out of their machines the infringing part (which costs only about 2*l*.) and substitute some equivalent which does not infringe.

T. Terrell, Q.C., and *A. J. Walter*, for the defendants. Sect. 20 does not strictly apply, no amendment having been yet allowed. But, at any rate, it imposes only a minimum condition, and the Court has a discretion under s. 19 to impose other conditions. Whether a general practice was or was not laid down in *Deeley* v. *Perkes* (1), the condition there imposed ought to be imposed here also. Otherwise a patentee who has got a bad patent is placed in as good a position as if he had a

(1) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.

valid patent. There is no evidence that the plaintiffs have ever worked their patent in this country; and, having regard to this fact and to all the other circumstances of the case, the condition which has been imposed is fair and reasonable.

Bousfield, Q.C., in reply.

LINDLEY M.R. I do not think there is any real difficulty in this case, although it is of an unusual kind. So far as the appeal raises any question of general practice, I propose to say nothing. It appears to me that each case must depend entirely upon its own circumstances. I am certainly not prepared to take the view that the form of order which the House of Lords adopted in *Deeley* v. *Perkes* (1) is to be adopted as a common form. I do not understand the House of Lords to have intimated anything of that kind. There were very special circumstances in that case which, in the view of the House (and I think this must be the view of every one who looks at the facts dispassionately), made it proper to impose the terms which they did impose. It does not at all follow that it would be proper to impose those terms in other cases simply because liberty is asked to apply for leave to amend a specification by way of disclaimer or otherwise.

On the construction of the statute I do not think there is much difficulty. I have no doubt that s. 20 applies to all cases in which an amendment has been allowed, whether the application for leave to amend has been made before litigation under s. 18, or after litigation under s. 19. And s. 20 is valuable as shewing what the Legislature has thought right to impose as a condition when an amendment has been allowed. Whether that is a minimum condition or not, it is a circumstance to be taken into consideration, and when either the comptroller, under s. 18, or the Court, under s. 19, has to decide what terms ought to be imposed before leave to amend or to apply for leave to amend is given, it becomes important to consider what reason there is for imposing any terms, having regard to what must follow under s. 20 if an amendment is allowed. I

(1) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.

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approach the present case from that point of view, which I think is as favourable to the appellants as possible. In my opinion, the very peculiar circumstances of this case render it just and proper that the condition imposed by the learned judge should stand unaltered. The patent is eight years old, and it has never been worked in this country. The specification makes twenty-two claims (I have not had an opportunity of criticising it), and eight years after its date this action is brought for infringement. The action is met with the ordinary defences to such an action, and also by a petition to revoke the patent. What do the patentees do? They seek to get rid of twenty out of their twenty-two claims, and to cut down their patent from a large and roaming and, as we are now entitled to say, an extravagant claim to a minimum which they hope will hold water. What has been done in the meantime? The defendants have been making machines which the plaintiffs say were made in accordance with their patent before amendment, infringing, I suppose, more than the two claims which they propose to retain. These machines are very costly, and the defendants sold them in the ordinary course of their trade, not supposing until recently that they were doing anything wrong or infringing any one's rights.

Are we to confiscate these machines, or to tell the defendants that, if the plaintiffs succeed in patching up their patent and obtaining a valid patent by means of the disclaimer which they seek to make, they are to be liable to an action by the plaintiffs which will deprive them of the benefit of what they have done, and, as the law stands, done properly? I do not think that would be at all fair. I think it would be eminently unjust to do that which would in substance amount to confiscating the machines which are in the defendants' hands, and would render it impossible for them to obtain the price of those which they have sold, so far as it has not yet been paid. In my opinion, the age of the patent and its apparent worthlessness until a very recent date are circumstances which render it unjust, inequitable, and unfair to alter the conditions which the learned judge has imposed. I think, therefore, that the appeal must

be dismissed with costs. But I protest against the notion that the order adopted in *Deeley* v. *Perkes* (1) ought to be regarded as a settled form applicable to all cases.

RIGBY L.J. I agree with what the Master of the Rolls has said, and I do not wish to add anything except upon one point. It has been suggested that the comptroller, following a decision of the law officers, will not now impose any conditions which are not contained in s. 20. I dare say it may come to that in many cases, but to lay that down as a matter of law would, I think, be a direct contradiction of the provision of s. 18, that "The law officer shall, if required, ... determine whether and subject to what conditions, if any, the amendment ought to be allowed." That must, of course, mean conditions in addition to those mentioned in s. 20, and it cannot have become the practice of the Patent Office or of the law officers to say that, considering s. 20 to be a very good one, they will not enter into the question whether any other conditions shall be imposed.

VAUGHAN WILLIAMS L.J. I entirely agree. If the only special circumstance upon which the defendants could rely had been that they had not only manufactured but sold machines, and the purchasers were refusing to pay for them, I am not sure that I should have thought the conditions imposed by Kekewich J. fair conditions. But, having regard to the other special circumstances, the age of the patent, what has been done under it, and the very large proportion of the claims which have been thrown overboard, I agree with the Master of the Rolls that it would be most unjust and unfair not to impose the conditions which have been imposed.

Solicitors: *Wilson, Bristows & Carpmael; Beyfus & Beyfus.*

(1) [1896] A. C. 496; 13 Rep. Pat. Cas. 581.

W. L. C.

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Feb. 6, 8, 9, 12, 13;
March 6.

ATTORNEY-GENERAL *v.* GUARDIANS OF THE POOR OF THE MERTHYR TYDFIL UNION.

[1898 P. 1776.]

Poor Law—Guardians of the Poor—Persons entitled to Relief—"Sudden and urgent Necessity"—Able-bodied Men unwilling to Work—Strike of Workmen—"Idle and Disorderly Persons"—Prosecution by Guardians—Powers of Local Government Board—Jurisdiction of High Court—Injunction—Public Authority—Practice—Declaration of Right—Poor Relief Act, 1601 (43 *Eliz. c.* 2), *s.* 1—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3—*Poor Law Amendment Act*, 1834 (4 *& 5 Will.* 4, *c.* 76), *ss.* 15, 52, 54—*Poor Law Audit Act*, 1848 (11 *& 12 Vict. c.* 91), *s.* 4—*Rules of Supreme Court*, 1883, *Order* XXV., *r.* 5.

The classes of persons who are entitled to poor law relief are still (notwithstanding subsequent legislation) the same as those mentioned in s. 1 of the Act of 43 Eliz. c. 2.

Able-bodied men who can, if they choose, obtain work which will enable them to maintain themselves, their wives and families, but who, by reason of a strike or otherwise, refuse to accept that work, are not entitled to relief, except that, if they become physically incapable of working, the guardians may, to prevent their starving, give them temporary relief. But in that case the guardians ought to prosecute them under the Vagrancy Act, 1824, s. 3, as "idle and disorderly persons."

The wives and children of such men, however, are entitled to relief, though they themselves are not.

Semble also, that men who are prevented from accepting work by fear of physical violence are entitled to relief.

A general strike of workmen does not of itself create a case of "sudden and urgent necessity" within the meaning of s. 54 of the Poor Law Amendment Act, 1834.

The High Court has jurisdiction to restrain guardians from applying the poor-rates improperly.

But this jurisdiction does not interfere with the power of the Local Government Board under s. 4 of the Poor Law Audit Act, 1848, to remit improper payments by guardians which have been disallowed by the auditor.

The plaintiffs claimed an injunction to restrain the defendants from applying the rates in the relief of able-bodied men who could have obtained work, but who refused to accept it, and also a declaration of the illegality of such an application of the rates. At the trial of the action the plaintiffs did not ask for an injunction:—

Held, that the Court had jurisdiction, and ought to make a declaration that any payment out of the rates for setting to work or for the relief of able-bodied men who could at the time obtain and perform work at wages

sufficient to support themselves and their wives and families (if any) was unlawful and ought to be disallowed by the auditor of the guardians' accounts.

But the declaration was not to include relief given to or for the wives and children of such men, and was in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under any statute enabling them to do so.

Decision of Romer J. reversed.

TRIAL OF ACTION.

The action was brought by the Attorney-General, at the relation of the Powell Duffryn Steam Coal Company, Limited, and by that company, on behalf of themselves and all other the ratepayers of the Merthyr Tydfil Union, against the guardians of the poor of that union.

The action was in the first instance brought by the Powell Duffryn Company as sole plaintiffs, and the Attorney-General was afterwards added as a co-plaintiff.

The facts of the case were thus summarised by Romer J. in his judgment:—

A strike of colliers occurred in 1898 in South Wales whereby many men who were not colliers were thrown out of employ. Many colliers and other workmen in the Merthyr Tydfil Union applied for poor law relief. The guardians established labour yards and relief works, and, partly by these yards and works, and partly by gifts of food or money, the necessitous workmen and their families were relieved. So far as the colliers were concerned, work was offered to them in neighbouring collieries, but they would not accept it, and of this the guardians were aware. The plaintiffs alleged that, at any rate so far as related to the colliers or other able-bodied persons who could obtain work, the guardians ought not to have relieved them. The plaintiffs contended that the payments made to the colliers or persons in the same position ought to be disallowed, and the guardians be ordered to refund the sums paid. The plaintiffs further asked for an injunction to restrain any further relief being given to such colliers or able-bodied persons. The guardians, to provide for relief in the union, had in the usual way issued to the overseers of the parishes comprised therein orders for contributions to the common fund of the union, and

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the overseers thereupon levied and collected a rate in their parishes. The plaintiffs alleged that this rate was higher than it otherwise would have been by reason of the guardians having improperly relieved workmen in the manner above stated. And, accordingly, they asked for an injunction to restrain the guardians from enforcing or receiving payments in respect of such orders. The plaintiffs also asked a declaration "that the establishment and maintenance by the defendants of labour yards or relief works for the purpose of providing outdoor relief for able-bodied persons, to the knowledge of the defendants otherwise able to maintain themselves and their families, and the expenditure by the defendants of parts of the common fund of the union for the purpose of relieving such able-bodied persons and their families, constituted a breach of the statutory duties of the defendants" as guardians. At the trial, the plaintiffs asked only for the declaration.

The relators were large ratepayers in the defendants' union, and they were also owners of one of the collieries in which the colliers had struck.

By their defence the defendants asserted that none of the acts of which the plaintiffs complained constituted a breach of the statutory powers or duties of the defendants or was in any respect illegal. And the defendants further said that if any of the relief granted by them was illegal it would be the duty of the district auditor to disallow the expenses incurred by the defendants in relation thereto and to surcharge the person or persons who authorized the payments, unless the Local Government Board should in pursuance of their statutory powers remit the disallowance and surcharge. And the defendants said that the proper remedy of the plaintiffs was to apply to the auditor, at the audit of the accounts relating to the alleged illegal expenses, to disallow and surcharge them.

Interrogatories were administered by the plaintiffs, and in answer to the fourth interrogatory the defendants' clerk said:—

4. "I believe that at the time when persons who had formerly been engaged in or about the plaintiff company's and other collieries were relieved at the labour yards they might have obtained and were offered work upon terms which they did not

think proper to accept, and that notices containing the offer of such terms were posted at the said collieries. And I believe that the relieving officers and individual members of the defendant board of guardians were aware of the fact."

The action came on for trial before Romer J. on February 21, 1899.

Neville, Q.C., *Cripps, Q.C.*, and *Micklem*, for the plaintiffs, cited *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1); *Barraclough* v. *Brown* (2); *Attorney-General* v. *Compton* (3); *Newcastle Corporation* v. *Attorney-General* (4); *Hosegood* v. *Camps* (5); *Attorney-General* v. *Dublin Corporation* (6); *Attorney-General* v. *West Hartlepool Improvement Commissioners* (7); *Attorney-General* v. *Southampton Union.* (8)

Cozens-Hardy, Q.C., *Farwell Q.C.*, and *Alexander Glen*, for the defendants, referred to *Pasmore* v. *Oswaldtwistle Urban Council* (9); *Reg.* v. *Curtis* (10); *Attorney-General* v. *Wigan Corporation* (11); *Frewin* v. *Lewis.* (12)

Neville, in reply, cited *Rex* v. *North Riding of Yorkshire Justices.* (13)

1899. March 27. ROMER J. In the course of this case some general questions of considerable importance were raised, upon which I think it right to express my opinion. The main question is as to the right of guardians of the poor to relieve workmen on strike out of the poor rates fund. Now, a workman on strike is in no better or worse position than any other subject of Her Majesty who, for reasons which seem to him sufficient, will not work. A man, though he is able to work and has work offered to him which is within his capacity, and on terms which would keep him and his family, may refuse to work, so long as he does not call upon the guardians to support

(1) [1898] 2 Ch. 331.
(2) [1897] A. C. 615.
(3) (1842) 1 Y. & C. Ch. 417.
(4) [1892] A. C. 568.
(5) (1889) 53 J. P. 612.
(6) (1827) 1 Bli. (N.S.) 312; 30 R. R. 43.
(7) (1870) L. R. 10 Eq. 152.
(8) (1849) 17 Sim. 6.
(9) [1898] A. C. 387.
(10) (1885) 15 Cox C. C. 746.
(11) (1854) Kay, 268.
(12) (1838) 4 My. & Cr. 249.
(13) (1823) 3 Dow. & Ry. 510; 2 B. & C. 286.

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him. But when he applies for poor law relief, then different considerations arise. If he can get work which he is able to do, and by which he could earn sufficient to keep him and his family, then, speaking generally, the guardians ought not to support him out of the fund. But to this rule there is an exception. If he or his family be starving and might die or be seriously injured unless relief be immediately given, or any other case of sudden and urgent necessity arises, the guardians ought to grant out of the fund such relief as may under the circumstances of the case be immediately required, and this though the urgency of the case may have arisen even from the wilful refusal of the man to work; for the punishment of such wilful refusal ought not to be the death or serious injury of the man, still less of his family. But when the urgent pressure of the moment is relieved, then the guardians ought to require the man to work, and if he is able to get and to do work which would keep him, the guardians ought not then to support him in idleness out of the fund. In other words, in such a case the guardians, though giving urgent relief, ought not to grant permanent relief. But it may be said, What are the guardians to do if the man wilfully persists in his refusal to work and so brings about from time to time further cases of urgency necessitating immediate relief? I think the answer to this is to be found in the provisions of the Vagrancy Act, 1824, s. 3, which provides that every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family, whom he or she may be legally bound to maintain, shall have become chargeable to any parish, township, or place, shall be deemed an idle and disorderly person within the true intent and meaning of this Act, and it shall be lawful for any justice of the peace to commit such offender to the house of correction, there to be kept to hard labour for any time not exceeding one calendar month. Now, under s. 59 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101), the guardians are empowered to prosecute in such a case and to pay the costs out of the poor-rates. It appears to me that in proper cases,

where the misconduct is wilful and persistent, they ought to prosecute, and I think their adoption of this course would probably speedily put an end to such wilful conduct as that above suggested. The punishment in one or two cases would act as a deterrent in others. Of course, the guardians should exercise a proper discretion in each case according to its circumstances in determining whether or not to put in force the provisions of the Vagrancy Act, 1824, to which I have called attention, and would not be interfered with by this Court in the exercise of their discretion. One more general question calls for observation before I proceed to deal with the special circumstances of this action. Without doubt in a proper case this Court has jurisdiction in an action at the instance of ratepayers to restrain guardians from applying the poor-rates for unauthorized purposes. See, for example, *Attorney-General* v. *Southampton Union* (1) and *Attorney-General* v. *West Hartlepool Improvement Commissioners*. (2) But such an action could not be instituted or used for the purpose of asking this Court to determine whether or not the guardians have in certain cases been right or wrong in granting relief, or to take or audit the accounts of the guardians, or decide what items of expenditure ought or ought not to be allowed. It is for the auditors appointed by the Local Government Board to audit the accounts of the guardians, and to decide whether any, and what, items should be allowed or disallowed, subject to such rights of appeal as are provided by the Poor Law Amendment Act, 1844. An appeal may be made to the Local Government Board, and in case of such appeal by virtue of s. 4 of the Poor Law Audit Act, 1848, the Board has power to decide any question of allowance or disallowance or surcharge "according to the merits of the case," and has the additional power (which this Court would not have), even if it found a disallowance or surcharge to have been rightly made by the auditor, to remit the disallowance or surcharge if the Board thought the subject-matter thereof was incurred under such circumstances as to make it fair and equitable to remit. Clearly the ordinary and proper course for

(1) 17 Sim. 6. (2) L. R. 10 Eq. 152.

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ratepayers to take who object to expenditure by the guardians is to go before the auditors, and, if dissatisfied with their decision, to appeal, as provided, and this Court ought not to interfere except under some very special and peculiar circumstances. Nor, speaking generally, is it proper for ratepayers who may object to a poor-rate as being excessive to come to this Court by way of appeal against it, and ask for an injunction. I now come to the special circumstances of this action. The plaintiffs' case, shortly stated, is as follows: [His Lordship stated the facts as above set forth, and continued:—]

Now, this general case is based on the assumption that the guardians in no case could relieve able-bodied men who could but would not work. But, as above pointed out, this view is mistaken. If a case of starvation or of sudden and urgent necessity arose, the guardians would be bound to relieve, even though it arose from an able-bodied man refusing to work, and, indeed, if they did not they might render themselves liable to serious consequences. Now each case relieved by the guardians during the strike seems to have been investigated by their officers and to have been one of actual destitution. No single case was proved by the plaintiffs before me where the relief was not one of sudden and urgent necessity. Of course there may have been such cases, but I cannot assume their existence. And if the plaintiffs' claim be reduced to one of improper relief in particular cases, then their proper course is to go before the auditors and get the special items disallowed. Had the defendants in this case contended that they were entitled to relieve, or admitted that they had relieved, workmen on strike, not only in cases of temporary urgent necessity, but by way of permanent relief, I might have seen my way to give some assistance to the plaintiffs in this action by way of declaration or otherwise. But the defendants have not done this. I now come to another contention on behalf of the plaintiffs. Under orders of October, 1870, of the Poor Law Board, the defendants, as to able-bodied persons requiring relief, had to relieve wholly in the workhouse, except under special circumstances mentioned in the orders. The plaintiffs contend that the defendants disregarded the regulations contained in these orders

by establishing the labour yards or relief works complained of and by relieving the persons thereby employed or their families. But the orders themselves provide that in case the guardians depart in any particular instance from the regulations, and within fifteen days after such departure report the same and the grounds thereof to the Poor Law Board (now represented by the Local Government Board), and the Board approve of such departure, then the relief granted in such particular instance shall, if otherwise lawful, not be deemed to be unlawful or be subject to be disallowed. Now the defendants, by several reports, did report to the Local Government Board all the particular instances in which relief was being granted to the persons employed at the labour yards or relief works in question, and the grounds for granting such relief. The Board approved of the granting of the relief in all the cases, except that up to the present time it has not approved of the employment referred to in one of the reports dated September 3, 1898. That approval ends the dispute so far as concerns the relief referred to in the approved reports, at any rate, so far as concerns this action (as already pointed out). I cannot say that any of the relief given by the guardians was not "otherwise lawful," within the meaning of those words as used in the orders of October, 1870. With regard to the excepted report, if the cases falling within it do not come within any of the special circumstances referred to in the orders, the auditors will, no doubt, disallow the items, and then if the guardians appeal to the Board it will be for the Board to determine whether under all the circumstances of the case it will or will not remit the disallowance. With regard to the items of relief not yet approved of by the Board, as well as to any items in the approved reports which the plaintiffs may be able hereafter to shew were not "otherwise lawful," though none such have been proved before me, clearly the proper course to be pursued is to let them go before the auditors and then, if necessary, before the Local Government Board. But I ought further to point out that one of the special circumstances justifying relief out of the workhouse mentioned in the orders of October, 1870, is "where such person shall require relief on account of sudden

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and urgent necessity." Now clearly if a very large number of able-bodied persons entitled to relief have suddenly to be dealt with by the guardians it may be impossible for the guardians to put them all in the workhouse. And in such a state of things a case of "sudden and urgent necessity" would, in my opinion, have arisen within the meaning of those words as used in the orders justifying relief being given out of the workhouse. So that the defendants may well be able to establish before the auditors that, even as regards the items in the excepted report, there was no necessity to report them to the Board within the fifteen days, though for greater caution the guardians did in fact report them. It follows, having regard to what I have said in the circumstances of this case, and the general principles applicable to actions of this class, that in this action, so far as concerns the active relief sought, I can grant none to the plaintiffs; and, indeed, at the bar the plaintiffs' counsel did not ask me to grant any such relief. All that I was asked to do was to grant the following declaration: [His Lordship read the declaration which the plaintiffs claimed, and continued:—]

Now, a declaration in that form I clearly could not make, for it omits all reference to special circumstances arising from sudden and urgent necessity; and when I consider what form of declaration I could make in this case, it appears to me that I could only state the general principles on which guardians ought to act as set forth in the first part of this judgment. But the defendants would rightly object to my making such a vague declaration, especially as it has not been proved that they have acted contrary to those principles, or that they have threatened or intended so to act. They may, of course, in certain cases, have given relief when they ought not to have done so, and those cases can hereafter be investigated by the auditors, but they have not purported to act, or contended they have a right to act, on any erroneous principle, and the evidence before me does not shew that in fact they have acted on an erroneous principle. It appears to me, under the circumstances, that I ought not to make a declaration against the defendants. And I agree with the view taken by Stirling J. in *Grand Junction Waterworks Co.* v. *Hampton Urban*

Council (1), that in cases of this class the Court ought not, except under very special circumstances, to make declarations of right, or interfere by way of injunction. The action, therefore, must be dismissed, and I can find no sufficient reasons for departing from the rule that the unsuccessful party must pay the costs.

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The plaintiffs appealed. The appeal came on for hearing on February 6, 1900. (2) C. A.

(1) [1898] 2 Ch. 331.

(2) The following material sections of statutes and clauses of orders of the Poor Law Commissioners were (inter alia) referred to:—

The Poor Relief Act, 1601, s. 1, provides that the churchwardens and overseers of the poor of the parish "shall take order from time to time .... for setting to work the children of all such whose parents shall not" by the churchwardens and overseers, ... "be thought able to keep and maintain their children: And also for setting to work all such persons, married or unmarried, having no means to maintain them, and* use no ordinary and daily trade of life to get their living by: And also to raise weekly or otherwise, by taxation of every inhabitant .... in such competent sum and sums of money as they shall think fit, a convenient stock of flax, hemp .... to set the poor on work: And also competent sums of money for and towards the necessary relief of the lame, impotent, old, blind, and such other among them, being poor, and not able to work, and also for the putting out of such children to be apprentices, to be gathered out of the same parish, according to the ability of the same parish, and to do and execute all other things as well for the disposing of the said stock, as otherwise concerning the premises, as to them shall seem convenient."

By the Vagrancy Act, 1824, s. 3: "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish .... shall be deemed an idle and disorderly person," and be liable to prosecution by the guardians.

The Poor Law Amendment Act, 1834, by s. 1 provides for the appointment of Poor Law Commissioners. By s. 15: "from and after the passing of this Act the administration of relief to the poor throughout England and Wales, according to the existing laws, or such laws as shall be in force at the time being, shall be subject to the direction and control of the said Commissioners; and for executing the powers given to them by this Act the said Commissioners shall and are hereby authorized and required, from time to time as they shall see occasion, to make and issue all such rules, orders

Sic in Statutes at Large. In the Revised Statutes, vol. i., the word "and" is omitted. In Chitty's Statutes, vol. ix., "as" is substituted for "and."

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Neville, Q.C., *Upjohn, Q.C.*, and *S. G. Lushington*, for the relators. The question is how far the poor law authorities are

and regulations for the management of the poor, for the government of workhouses and the education of the children therein, and for the management of parish poor children" (under the provisions of an Act mentioned), "and the superintending, inspecting and regulating of the houses wherein such poor children are kept and maintained, and for the apprenticing the children of poor persons, and for the guidance and control of all guardians, vestries, and parish officers, so far as relates to the management or relief of the poor, and the keeping, examining, auditing, and allowing of accounts, and making and entering into contracts in all matters relating to such management or relief, or to any expenditure for the relief of the poor, and for carrying this Act into execution in all other respects, as they shall think proper; and the said Commissioners may, at their discretion, from time to time suspend, alter, or rescind such rules, orders, and regulations, or any of them: Provided always, that nothing in this Act contained shall be construed as enabling the said Commissioners or any of them to interfere in any individual case for the purpose of ordering relief."

[The powers of the Poor Law Commissioners are now vested in the Local Government Board.]

Sect. 52 contains a recital that "a practice has obtained of giving relief to persons or their families who, at the time of applying for or receiving such relief, were wholly or partially in the employment of individuals, and the relief of the able-bodied and their families is in many places administered in modes productive of evil in other respects." And that "difficulty may arise in case any immediate and universal remedy is attempted to be applied in the matters aforesaid;" and it enacts that from and after the passing of the Act "it shall be lawful for the said Commissioners, by such rules, orders, or regulations as they may think fit, to declare to what extent and for what period the relief to be given to able-bodied persons or to their families in any particular parish or union may be administered out of the workhouse of such parish or union, by payments in money, or with food or clothing in kind, or partly in kind and partly in money, and in what proportions, to what persons or class of persons, at what times and places, on what conditions, and in what manner such out-door relief may be afforded; and all relief which shall be given by any overseer, guardian, or other person having the control or distribution of the funds of such parish or union, contrary to such orders or regulations, shall be and the same is hereby declared to be unlawful, and shall be disallowed in the accounts of the person giving the same, subject to the exceptions hereinafter mentioned: Provided always, that in case the overseers or guardians of any parish or union to which such orders or regulations shall be addressed or directed shall, upon consideration of the special circumstances of such parish or union, or of any person or class of persons therein, be of opinion that the application and enforcing of such orders or regulations, or of any part thereof, at the time or in the manner prescribed by the said Commissioners, would be inexpedient, it shall be lawful for such overseers or guardians to delay the

entitled to grant relief out of the rates to persons who are destitute in the sense of not having money or food in their

operation of such orders or regulations, or of any part thereof, for any period not exceeding the space of thirty days, to be reckoned from the day of the receipt of such orders or regulations; and such overseers or guardians shall, twenty days at the least before the expiration of such thirty days, make a statement and report of such special circumstances to the said Commissioners; and all relief which shall be given by such overseers or guardians, before an answer to such report shall have been returned by the said Commissioners, if otherwise lawful, shall not be deemed unlawful although the same shall have been given contrary to such orders or regulations, or any of them; but in case the Commissioners shall disapprove of such delay, or think that for the future such orders or regulations ought to come into operation, notwithstanding the special circumstances alleged by such overseer or guardian, it shall be lawful for the said Commissioners, by a peremptory order, to direct that from and after a day to be fixed thereby such orders and regulations, or such parts or modifications thereof as they may think expedient and proper, shall be enforced and observed by such overseers and guardians; and if any allowance be made or relief given by such overseers or guardians after the said last mentioned period, contrary to any such last mentioned order, the amount of the relief or allowance so given shall be disallowed in the accounts of the party giving the same: Provided also, that a quarterly report of all such cases as shall occur in any quarter shall, at the end of every such quarter, be laid by the Commissioners before one of His Majesty's Principal Secretaries of State: Provided also, that in case the overseers or guardians of any parish or union in which such orders or regulations shall be in force shall depart from them or any of them in any particular instance or instances of emergency, and shall within fifteen days after every such departure report the same and the grounds thereof to the said Commissioners, and the said Commissioners shall approve of such departure, or if the relief so given shall have been given in food, temporary lodging, or medicine, and shall have been so reported as aforesaid, then and in either of such cases the relief granted by such overseers or guardians, if otherwise lawful, shall not be unlawful or subject to be disallowed."

By s. 54, "From and after the passing of this Act the ordering, giving, and directing of all relief to the poor of any parish which, according to the provisions of any of the said recited Acts, or of an Act (1 & 2 Will. 4, c. 60), or of this Act, or of any local Acts, shall be under the government and control of any guardians of the poor, or of any select vestry, and whether forming part of any union or incorporation or not (but subject in all cases to, and saving and excepting the powers of, the said Commissioners appointed under this Act), shall appertain and belong exclusively to such guardians of the poor or select vestry, according to the respective provisions of the Acts under which such guardians or select vestry may have been or shall be appointed; and it shall not be lawful for any overseer of the poor to give any further or other relief or allowance from the poor-rate than such as shall be ordered by such guardians or select vestry, except in cases

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possession, but are not destitute in the sense of being without the means of subsistence. The colliers had a perfect right to

of sudden and urgent necessity, in which cases he is hereby required to give such temporary relief as each case shall require, in articles of absolute necessity, but not in money, and whether the applicant for relief be settled in the parish where he shall apply for relief or not. . . ."

By the Poor Law Audit Act, 1848, s. 4, "Where any appeal shall be made to the said" (Poor Law) "Commissioners against any allowance, disallowance, or surcharge made by any auditor in the accounts of any guardians, overseers, or their officers, it shall be lawful for the said Commissioners to decide the same according to the merits of the case; and if they shall find that any disallowance or surcharge shall have been or shall be lawfully made, but that the subject-matter thereof was incurred under such circumstances as make it fair and equitable that the disallowance or surcharge should be remitted, they may . . . . direct that the same shall be remitted," upon payment of certain costs.

By the (Out-door Relief Prohibitory) Order of the Poor Law Board of October 1, 1870:—

Art. 1. "From and after the 31st October inst. every able-bodied person male or female requiring relief from any parish within the said union should be relieved wholly in the workhouse of the union, together with such of the family of every such able-bodied person as may be resident with him or her and may not be in employment, and together with the wife of every such able-bodied male person, if he be a married man, and if she be resident with him, save and except in the following cases" (inter alia):—

"(1.) Where such person shall require relief on account of sudden and urgent necessity."

By Art. 6: "Provided always, that in case the guardians of the union depart in any particular instance from any of the regulations hereinbefore contained, and within fifteen days after such departure report the same and the grounds thereof to the Poor Law Board, and the Poor Law Board approve of such departure, then the relief granted in such particular instance shall, if otherwise lawful, not be deemed to be unlawful or be subject to be disallowed."

By the Supplemental (Out-door Labour Test) Order of October 29, 1870:—

Art. 1: "Every able-bodied male pauper who may receive relief from any parish within the union and may be relieved out of the workhouse with the approbation of the Poor Law Board, according to the 6th article of an order of the Poor Law Board dated the 1st day of October inst., shall be relieved in the following manner, that is to say:—

"Half at least of the relief given to such pauper shall be given in food, clothing and other articles of necessity.

"No such pauper shall receive relief from the guardians of the union, or any of their officers or any overseer of any parish in the union, while he is employed for wages or other hire or remuneration by any person; but every such pauper so relieved shall be set to work by the guardians."

Art. 3: "If the guardians of the union shall depart in any particular instance from any of the regulations hereinbefore contained, and shall

strike for higher wages, but not to do so at the expense of the rates. During the whole period of the strike the collieries were open to any who chose to go and work there. The learned judge said that this was a case of "sudden and urgent necessity," first, because the men had no food and no money, and secondly because of the difficulties of the poor law authorities in dealing with such a large number of applications for relief. As to the first ground, it is submitted that a man who has neither money nor food, but who has the means of getting money and food, if he chooses to work for them, is not destitute within the meaning of the term as used in the poor law legislation. As to the second ground, it is submitted that the "sudden and urgent necessity" which will justify the poor law authorities in giving outdoor relief to able-bodied persons is to be regarded from the point of view of the object of relief, not from the point of view of the poor law authorities, and in fact there was no suddenness here, since the strike had been carefully organised and lasted for several months.

The question turns primarily upon 43 Eliz. c. 2, which is the foundation of the poor law legislation. That statute provides for the setting to work of "all such persons married or unmarried having no means to maintain them as use no ordinary and daily trade of life to get their living by," and it authorizes relief to be granted in money to the impotent poor. These colliers were not without the means of maintaining themselves, since they had the opportunity to work, nor were they unable to work. They therefore do not fall within either of the classes comprised in the statute of Elizabeth: see Lambard's Eirenarcha, pp. 207–9.

No doubt, if a man is a proper object of poor law emergency relief, it is not the business of the guardians to inquire how he became so. But if a man is able to work and thus support

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within fifteen days after such departure report the same and the grounds thereof to the Poor Law Board, and if the Poor Law Board shall approve of such departure, then the relief granted in such particular instance shall, if otherwise lawful, not be deemed to be unlawful, or be subject to be disallowed."

Both these orders applied to the Merthyr Tydfil Union.

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himself, it is the duty of the guardians to compel him to work, either by finding work for him, or by setting him to work themselves. Romer J. has extended the exception to the general rule so far as really to destroy the rule. In the present case the guardians gave relief from day to day, and they held only one inquiry. Some of the men were relieved for as long as twelve weeks in succession. Such cases could not have been cases of urgency. The decision of Romer J. makes the labour test nugatory. A man would only have to come to the guardians every morning and say he was starving, and then he could obtain relief without doing any work at all.

If a man is able to work, he is not entitled to relief if he will not work. The guardians ought not to be compelled to prosecute such a man at the expense of the ratepayers. The first instance of the use of the expression, "sudden and urgent necessity," in the Poor Law Acts is in s. 54 of the Poor Law Amendment Act, 1834, which requires the overseers in such cases to give temporary relief in kind, not in money, though in ordinary cases relief can be given only by the guardians. If a man's wages were paid only once in a fortnight, the guardians might give him temporary relief pending the receipt of his wages. But this would rarely be necessary, as workmen who are known to be in employment can generally obtain credit from tradesmen. No complaint is made of the relief given by the guardians to workmen who were not on strike, but who were thrown out of work by reason of the scarcity of coal.

Under the Poor Law Acts before 1834 the poor were divided into two classes—(1.) The "impotent poor," those who were unable to work. The remedy provided for them was relief in either (*a*) kind or (*b*) money. (2.) The "able-bodied poor," and they again were divided into (*a*) those willing to work and (*b*) those unwilling to work. In neither of these cases was relief provided without work. If possible, work was to be found for a man willing to work; if work could not be found the guardians were themselves to set him to work, and to pay him for his labour. Those able-bodied persons who refused to work were to be punished as "rogues and vagabonds."

[LINDLEY M.R. They would have to be supported by the State.]

But only on bread and water. In the report of *Rex* v. *Collett* (1) there is appended a learned note by the reporters giving a summary of the provisions of the Poor Law Acts prior to 43 Eliz. c. 2, beginning with 22 Hen. 8, c. 12, and it shews that the above-mentioned view of their provisions is accurate. This is confirmed also by the resolutions of the judges; Lambard's Eirenarcha, pp. 207 et seq., and by *Rex* v. *Inhabitants of Hyworth* (2); *Rex* v. *North Riding of Yorkshire Justices* (3); *Rex* v. *Collett*. (4) Sect. 1 of 43 Eliz. c. 2, which speaks of "such persons . . . . having no means to maintain them, as use no ordinary and daily trade of life to get their living by," cannot apply to men who wilfully abstain from their ordinary work. The Act 22 Geo. 3, c. 83 (known as Gilbert's Act), was in force for more than fifty years. It was found that it led to farmers giving inadequate wages to their labourers, the wages being supplemented by allowances out of the rates. This was one of the reasons which led to the passing of the Poor Law Amendment Act of 1834.

In *Rex* v. *Collett* (4) the Court declined to say whether pecuniary relief could be given to able-bodied persons until they knew whether the overseers had fulfilled their primary duty of endeavouring to find employment for them. In the present case the guardians did not attempt to find employment for the men before giving them relief.

Sect. 3 of the Vagrancy Act (5 Geo. 4, c. 83), was relied on by the defendants as implying that a man who wilfully refuses or neglects to work may become chargeable to the parish. That section is only a definition of an idle and disorderly person, and was not intended to make such an alteration of the law. Down to that time an able-bodied man who did not choose to work could not compel the overseers to relieve him. Sect. 3 does not mean that such a person is entitled to relief. It means only that it is a criminal offence if he

(1) (1823) 2 B. & C. 324, 336.
(2) (1716) 1 Str. 10.
(3) 3 Dow. & Ry. 510; 2 B. & C. 286.
(4) 2 B. & C. 324; 3 Dow. & Ry. 582.

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does that which makes himself or his family chargeable to the parish.

The Poor Law Amendment Act, 1834, did not alter the then existing law as to the persons entitled to relief. It had become a universal practice in agricultural districts to supplement the labourers' wages. In abolishing that practice power was given to the overseers or guardians to delay the operation of the regulations made by the Poor Law Commissioners, so that the alterations might be made gradually. The Commissioners might make different regulations in different unions. This was a temporary provision. The Legislature said in effect, the law is right, but it has been administered in such a way as to cause abuses. We wish to correct these abuses, but it may not be desirable to do so all at once, and therefore we create an authority with a discretion as to the administration of the law in different places. The Act was dealing with cases in which there was a right to relief, and it provided for its administration. The intention was only to alter the mode of administration.

When art. 1 of the Order of October 1, 1870, speaks of "able-bodied person requiring relief," it must mean applying for relief in accordance with the law, not demanding it as a right. "Sudden and urgent necessity" does not of itself give a title to relief, though it is to be taken into account in the administration of relief. The Order of October 29, 1870, is a proviso to art. 6 of the Order of October 1. A man cannot be permitted to create "sudden and urgent necessity" for himself day after day by his own conduct. Those words apply only to the mode of administering relief when there is a prior title to relief. The relief so given is to be temporary, but only when that prior title exists.

[LINDLEY M.R. It is to be given in kind, not in money.]

And the matter is to be brought before the guardians at their next meeting.

With regard to the wives and children of the strikers, they have under the Poor Law no independent right of relief apart from the husband and father.

[RIGBY L.J. Does not that argument involve the power of the husband to deprive them of their right to relief?]

That may be so under the poor law; but as regards children that power is taken away by the Prevention of Cruelty to Children Act, 1894 (57 & 58 Vict. c. 41), s. 5, sub-s. 4. By s. 56 of the Poor Law Act of 1834 the relief is deemed to be given to the father; but the point does not arise in this case, because there is no mention of relief having been given to any wife or children apart from the man. The only way in which the wife and children come in is by increasing the relief given to the man. There is a provision in the Act of Elizabeth as to children; but that is only for setting to work the children of parents not able to maintain them. It may be that children under a certain age might be treated as impotent poor, though that would be contrary to the fact in some cases.

[VAUGHAN WILLIAMS L.J. In *Reg.* v. *Islington Union* (1) it was held that relief given to a child over sixteen, under s. 56 of the Act of 1834, was not relief given to the parent.]

With regard to the remedy, the right of ratepayers at the suit of the Attorney-General to come to the Court of Chancery for an injunction to restrain an improper application of the poor-rates is well settled: *Attorney-General* v. *Wilkinson* (2); *Attorney-General* v. *Southampton Union* (3); *Attorney-General* v. *Compton* (4); and see *Reg.* v. *Stewart* (5) and *Attorney-General* v. *West Hartlepool Improvement Commissioners.* (6)

It may be said that the proper remedy of the ratepayers is under ss. 33 to 36 of the Poor Law Amendment Act, 1844 (7 & 8 Vict. c. 101); that they ought to have objected to the guardians' accounts before the auditor; and that, if they were aggrieved by his decision, they ought to have applied to the Queen's Bench Division for a writ of certiorari, or to have appealed to the Local Government Board. But the guardians would not be necessary parties to these proceedings, and the statute provides no means for the viva voce examination of witnesses. Neither certiorari nor an appeal to the Local Government Board would be an apt remedy in a case of this

(1) (1862) 31 L. J. (M.C.) 233; 3 B. & S. 46.
(2) (1859) 28 L. J. (Ch.) 392.
(3) 17 Sim. 6.
(4) 1 Y. & C. Ch. 417, 426.
(5) (1840) 12 Ad. & E. 773, 777.
(6) L. R. 10 Eq. 152, 158.

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kind. Those remedies do not take away the right of the Court of Chancery to interfere by injunction when there is a great question of principle involved. The plaintiffs ask the Court to state the law for the guidance of the tribunal which has to deal with the administration of the poor-rate.

Sir Edward Clarke, Q.C., *Swinfen Eady, Q.C.*, and *Alexander Glen*, for the guardians. It is the duty of the guardians to give relief, and if they find persons in actual want of money and food it is not for them to inquire into the causes of the destitution. The scheme and policy of the poor law is that destitution must be relieved, and if the guardians refused to grant relief and the destitution resulted in fatal consequences they would be indictable for manslaughter; and apart from any question of manslaughter, if a relieving officer refuses to grant relief in a case of sudden and urgent necessity, he is guilty of a criminal offence: *Clark* v. *Joslin*. (1) The relief of the poor and the punishment of vagrants go side by side; but that punishment can only be inflicted if a man has actually become chargeable on the rates. If the relief is required it must be given, and, if the circumstances are such that the man requiring relief might have avoided the necessity if he chose to work, then he is punished. Here, every case in which relief was given was dealt with individually, and it was ascertained that the applicants for relief were in a state of starvation or semi-starvation. If the relieving officer found the women and children without food he could not refuse the relief because the man whose duty it was to maintain them would not work. Nor could he refuse relief to the man himself. The only remedy was to prosecute him under the Vagrancy Acts. There is nothing in the Poor Law Acts which throws upon the guardians the burden of deciding whether an applicant for relief is acting reasonably in not taking the employment offered him.

[VAUGHAN WILLIAMS L.J. Must not the guardians satisfy themselves, not only that the applicant for relief is without food, but also that he is without the means of getting it? Why should any distinction be drawn between money and

(1) (1873) 27 L. T. 762; 21 W. R. 294.

work, which will equally get him food? *Tawney's Case* (1) shews that there may be an indictment for granting relief unnecessarily as well as for refusing relief.]

The statute of Elizabeth affords no justification for any distinction between able-bodied persons who can get work and able-bodied persons who cannot; but it provides that if they have no means to maintain themselves they shall be set to work, and the setting to work implies relief. Then, if a man declines his task, he may be prosecuted. "Having no means" signifies not having money or money's worth; it does not mean not having the possibility of obtaining the means: *Reg.* v. *Mabbett* (2); *Reg.* v. *Chandler.* (3) The whole substance of the law, as it at present exists, is contained in s. 52 of the Act of 1834. That section does not alter the obligation to provide for destitute people, but it empowers the Poor Law Commissioners, now represented by the Local Government Board, to make provisions for the regulation of the relief to be given, and under this section the orders of 1870 have been made with a view to provide for cases of sudden and urgent necessity. The facts established here are that a large number of persons were relieved, many of whom were not on strike themselves but were thrown out of work by the coal strike. Then, also, it is said that a large number of the persons relieved were out of work, but could not get work; but it is not shewn that any single man on strike could have obtained work, though no doubt all of them together could have done so. The plaintiffs have failed to prove a single instance in which relief has been given to a man who was offered work and refused it. Is it to be said that, unless a man goes to work in the face of the protests of his fellow-workmen, and in the face of the risk of the others declining to work with him, he is not to be relieved? The workhouse was full, and stone-yards had to be established in order that the labour test might be applied, and it is not for the Court to say whether this has been done on too large a scale; nor is it for the Court to inquire into the circumstances of each man who is relieved. The Court has

(1) (1703) Bott. 12; 16 Vin. Abr. tit. "Poor (A)," p. 415.

(2) (1851) 5 Cox C. C. 339.

(3) (1855) 6 Cox C. C. 519.

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not the machinery for determining these questions, and the Act of 1844 provides full remedies for the aggrieved ratepayers. The object of the poor law legislation was to give very large powers to the Commissioners, and if the ratepayers are dissatisfied with the administration of the parish funds they are allowed to attend the audit and object to the accounts, and then there is an appeal from the auditor to the Commissioners, now the Local Government Board, who have a special knowledge of these questions and special machinery for determining them. They receive reports from their district inspector, who may be consulted by the guardians, and in this case the inspector constantly advised the guardians as to what were cases of sudden and urgent necessity, and as to the nature of the relief to be granted. The remedy by certiorari was also open to the ratepayers, but that remedy is obviously inferior to an inquiry by the Local Government Board. The cases in which this Court has interfered were all cases in which the fund was being used not for poor relief at all but for some absolutely extraneous purpose. No case can be found in which this Court has interfered on the ground that relief has been improperly granted.

[VAUGHAN WILLIAMS L.J. referred to *Wise's Case* (1); *Rex* v. *Winship*. (2)]

The fact that full remedies are prescribed by statute is by implication an exclusion of the jurisdiction of the Court.

[VAUGHAN WILLIAMS L.J. Do you suggest that the power of indictment is taken away by the modern statutes?]

The Court of Queen's Bench has always exercised jurisdiction over cases relating to poor relief, and orders have been quashed in cases where the order does not shew the title of the applicant to relief; but where the order is sufficient on the face of it the Court does not interfere.

[VAUGHAN WILLIAMS L.J. referred to *Reg.* v. *Newtown and Llanidloes Union*. (3)]

(1) (1670) 1 Ventr. 69.

(2) (1770) 5 Burr. 2677.

(3) (1864) 28 J. P. 725. Cited in Aschrott's English Poor Law System, ed. 1888, p. 140, n. It appeared from an examination of the record that in 1864 a rule nisi was granted, upon the application of a female pauper,

There is no jurisdiction to grant an injunction; and if the Court has no power to grant an injunction it ought not to make a declaration: *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1); *Barraclough* v. *Brown.* (2) Moreover, by s. 4 of the Poor Law Audit Act, 1848, a power of dispensation is conferred upon the Local Government Board in cases of illegal payments, where they have been made under such circumstances as to make it fair and equitable that they should be borne by the rates; and, if the Court grants an injunction in this case, it will be depriving the Board of their power of dispensation under this section. Even a declaration ought not to be made, since it is inexpedient to attempt to transfer the discretion of the Board, who are the best judges of questions of this kind.

In *Rex* v. *Collett* (3) relief had apparently been given to able-bodied men without setting them to work, and the question was left open whether this was legal. In the present case the guardians did set the men to work. By the Act of 9 Geo. 1, c. 7, s. 4, workhouses were established for the first time. Indoor relief was made compulsory. If a man would not go into the house he was put out of the "collections." That Act was in force for twenty years. Then came Gilbert's Act, 22 Geo. 3, c. 83, which was not compulsory, but was adopted in many parishes. By s. 31 of that Act a duty was imposed on guardians to prosecute an able-bodied man who would not work, and if they failed to discharge that duty they were themselves liable to prosecution. No such compulsion of the guardians exists now. But there is now an absolute rule that no outdoor relief is to be given to any person who is in receipt of wages. By s. 35 of that Act if any poor person complained that the guardians had refused him proper relief the justices were to inquire into his case, and if they found that he ought

for a mandamus to the guardians to administer all necessary relief to her, but the rule was subsequently discharged, and a subsequent motion for a rule nisi was refused. This information was obtained from a statement made by Vaughan Williams L.J. The reporter has endeavoured, but without success, to see the record.

(1) [1898] 2 Ch. 331.
(2) [1897] A. C. 615, 623.
(3) 2 B. & C. 324.

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to be relieved, they could order the overseers to relieve him. If he was in want through his own fault the justices could send him to prison.

Sect. 52 of the Poor Law Amendment Act, 1834, was a new departure. By it outdoor relief was recognised, but it was placed entirely under the control of the Poor Law Commissioners. The duty of the guardians to set able-bodied men to work remains. But regard is to be had to the usage of years, with the knowledge of which the Legislature made a fresh enactment. The existing practice was recognised, though it was treated as an abuse, and the remedy was not to be applied at once universally. The Commissioners were empowered to make different orders for different parishes or unions. The proviso at the end of s. 52 means that, if the guardians depart from the regulations of the Commissioners, and they report the departure to the Commissioners within fifteen days, and the Commissioners approve of it, that departure (if otherwise lawful) shall not be unlawful by reason of the breach of the regulations.

[VAUGHAN WILLIAMS L.J. If the thing is unlawful independently of the breach of the regulations, it cannot be legalised by the Commissioners.]

It is submitted that able-bodied men out of work were always, and still are, entitled to relief, if they have a reasonable excuse for not working. In order to disentitle them to relief there must be a wilful refusal or neglect to work. If there is a reasonable excuse the refusal or neglect is not wilful. The guardians are not bound now to prosecute a man who will not work; they have a discretion, and they are entitled to consider the probability of obtaining a conviction. They would have to prove that the man could have obtained work on reasonable terms—not on any terms that any one might choose to offer: *Flannagan* v. *Bishopswearmouth Overseers*. (1) If a man is found to be destitute (from whatever cause) the guardians ought to relieve him. If then he is able-bodied and capable of maintaining himself and his family, the guardians should

(1) (1857) 27 L. J. (M.C.) 46.

prosecute him, if it is expedient to do so. It would have been impossible to prosecute thousands of colliers who were on strike. There is a distinction between the ordinary pauperism of a district, and a sudden emergency caused, e.g., by a great strike. Sufficient workhouse accommodation must be provided for the average number of paupers, but outdoor relief may be given in such cases of emergency. The scheme of the Acts and orders is to relieve all destitute persons; but, in order to prevent imposition and to keep down the rates, a labour test is required. The provisions of the order of October 29, 1870, have been complied with in the present case. The guardians have done exactly what they were bound to do under the Acts and orders.

The declaration for which the plaintiffs ask is not a declaration of right within the meaning of the Rules of the Supreme Court, 1883, Order xxv., r. 5. That rule was not intended to enable the Court to decide an abstract question of law, but only to declare a right inter partes: *Barraclough* v. *Brown*. (1)

Neville, Q.C., in reply. The labour test is a condition of relief under the Act of 1834.

The class of persons entitled to relief must still be determined by the Act 43 Eliz. c. 2; it has not been enlarged by any subsequent statute and cannot be enlarged by any orders of the Commissioners. Sect. 105 of the Act of 1834 provides that the legality of orders of the Commissioners may be determined by the Court of Queen's Bench by means of a certiorari. An overseer is accountable for the application of the rates to statutable purposes as defined by the statute of Elizabeth: *Reg.* v. *Stewart*. (2) There is an obvious distinction in that Act between able-bodied persons who can obtain work and will not work and able-bodied persons who cannot obtain work. The former were never entitled to relief. They are not without the means of maintaining themselves and their families, when they can have work if they choose to do it. The guardians would not be liable to prosecution for manslaughter in case of the death of a person whom they were not legally bound to relieve.

(1) [1897] A. C. 615. (2) 12 Ad. & E. 777.

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[LINDLEY M.R. Suppose work were offered on terms which no human being would accept?]

It is admitted that work was offered to the strikers at wages sufficient to maintain them and their families. *Rex* v. *Collett* (1) shews that it is sufficient if work is found for a man in some way. It is said that the plaintiffs ought to have applied to the Local Government Board. But the proper tribunal to decide an important question of law is the High Court. And any relief given by the Local Government Board would be inadequate. Application to them could not be made until the money had been raised and expended. And, if so, how could the money be got back again? There might not be a man of substance among the guardians. And no one would desire to ruin an individual guardian. The better course is to obtain the opinion of the Court on the question of legality beforehand. The rates are a quasi trust fund and the Attorney-General is the proper person to sue to prevent their being misapplied. The plaintiffs sought to restrain the guardians from collecting and illegally applying the rates. The plaintiffs failed to obtain an interlocutory injunction, though they applied for it, and before the trial the money had been raised and spent. At the trial the plaintiffs did not press for an order for restitution; they asked only for the declaration of right. But for the purpose of costs the Court had to decide whether the plaintiffs were right in bringing the action. Romer J. held that they were wrong, and this Court has now to say whether that decision was right. The Local Government Board have power to absolve from the consequences of their illegal acts persons who they may think ought not to suffer for those acts. But this would not be an answer to a motion for an injunction to restrain the commission of such acts.

Cur. adv. vult.

1900. March 6. LINDLEY M.R. Under the Poor Law Statutes passed before 1834 the only persons entitled to relief out of the poor-rates were those described in the 43 Eliz. c. 2,

(1) 2 B. & C. 324, 339.

under three heads—namely, (1.) the children of parents unable to keep and maintain them: (2.) such persons who, having no means to maintain themselves, used no ordinary and daily trade of life to get their living by; (3.) the lame, impotent, old, blind, and such others as were poor and not able to work. The first two of these classes were to be relieved by being set to work. The third alone were to be relieved without work. Omitting children, and speaking only of adults, the older statutes drew a broad distinction between, first, the impotent poor, that is, the poor unable to work who were to be relieved without work, and, secondly, the able-bodied poor, that is, the poor able to work but unable to maintain themselves. These were to be relieved, but only by being set to work. If a poor person able to work, and for whom work was found by the parish authorities, would not work, he became liable to imprisonment under s. 2 of the statute of Elizabeth and the subsequent Vagrancy Acts; but I can find nothing in the statutes before 1834 which entitled an able-bodied person having the means of supporting himself to obtain relief from the parish authorities by being set to work or otherwise. On the other hand, orders for the relief of poor persons were constantly quashed on the ground that they were not stated to be impotent. A poor person able to work, and able to procure work, might become chargeable to the parish by refusing to work so long as to become physically unable to work, or by reducing his wife and children to such a state as to render them chargeable to the parish. If he did this he would force himself and them on the rates and be punishable under the Vagrancy Acts. This is the true explanation of the language used in the Vagrancy Act, 1824, s. 3. It says, "Every person being able wholly or in part to maintain himself or herself, or his or her family, by work or by other means, and wilfully refusing or neglecting so to do, by which refusal or neglect he or she, or any of his or her family whom he or she may be legally bound to maintain, shall have become chargeable to any parish . . . . shall be deemed an idle and disorderly person," and be liable to imprisonment. The penalty here inflicted is for a wrong done by the person imprisoned; and the wrong done is by becoming chargeable or by rendering

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others whom he ought to support chargeable on the rates when he had no justification for so doing. It would be an entire perversion of this section to construe it as entitling an able-bodied man who could, if he would, support himself to relief of any kind by the parish authorities. He could demand no relief in food or work from them if he could obtain work and could support himself and his family without their assistance. This conclusion as to the effect of the older poor laws is based upon a careful perusal of them, and upon what is to be found in digests and treatises, and, in particular, upon the resolutions 8, 9, and 10 of the judges in Lambard's Eirenarcha, pp. 207–9, which I regard as an extremely valuable exposition of the law by persons thoroughly well acquainted with it and its working in and shortly after the reign of Elizabeth. I have not succeeded in finding any judicial interpretation of the words, "Such persons, married or unmarried, having no means to maintain them, as use no ordinary and daily trade of life to get their living by." These are the words used in s. 1 of the statute of Elizabeth to describe the class of able-bodied poor able to procure work. It must be borne in mind that the poor laws have nothing to do with the regulation of labour. That was provided for by other statutes relating to labourers and artificers. The poor laws impose on the comparatively well-to-do the duty of supporting those who by reason of their poverty cannot maintain themselves. This being so, the inability to maintain himself which justifies an able-bodied man in requiring relief from the poor law authorities must, I apprehend, be a real actual inability to support himself on any terms with which he can in fact comply, and which, as between him and the ratepayers, do not justify him in refusing to support himself. He cannot, in my opinion, lawfully justify such a refusal on the ground that he cannot obtain work on terms which, as between him and his employer, he considers reasonable. What is a reasonable agreement for a man to enter into is one thing; what is a reasonable justification for a man compelling others to support him is quite another thing; but it is the latter alone which the poor law authorities ought to consider. This is a matter of the utmost importance in the

present case, and, indeed, in all cases in which work can be obtained on terms which will enable a man to support himself and his family, but which he will not accept, because he prefers to stand out in the hope of obtaining better terms than those offered him.

The short effect of the poor laws before 1834 I understand to have been as follows: (1.) No one who was starving could be lawfully refused relief, whether he was in that state by his own fault or not; (2.) poor persons physically unable to work were entitled to relief out of the rates without being set to work; (3.) poor persons physically able to work, but who could not obtain work, were entitled to relief by having work found for them at the expense of the ratepayers, if no other work could be found; (4.) poor persons physically able to work were not entitled to relief in any other way; (5.) but poor persons able to work and able to procure it might, by refusing to work, become so weak as to be no longer able to work, in which case they became entitled to relief out of the rates and at the same time liable to imprisonment. This was an anomaly, for it enabled a person to obtain a legal advantage by his own wrong-doing. The anomaly was justified on grounds of humanity. The penalty for refusing to work was imprisonment, not death by starvation. Under various statutes passed in the reign of George III., namely, 22 Geo. 3, c. 83, ss. 29–35 (Gilbert's Act); 36 Geo. 3, c. 23, s. 1; 55 Geo. 3, c. 137, s. 3; 59 Geo. 3, c. 12, s. 2, outdoor relief was authorized to be given to able-bodied poor who could not support themselves and their families. But even when these Acts were in force, and abused as they were, I do not find that they, or any decisions upon them, authorized relief to able-bodied poor who could support themselves and their families, if they chose to do so. *Rex* v. *Inhabitants of Hyworth* (1) shews that before these Acts no relief could be lawfully given to such persons, and *Rex* v. *Collett* (2), decided in 1823, proceeded on the supposition that the law in this respect remained unaltered, though the mode of relieving able-bodied poor who could not obtain work was left undecided.

By the Act of 1834 (4 & 5 Will. 4, c. 76), the poor law was

(1) 1 Str. 10. (2) 2 B. & C. 324.

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very greatly improved. Boards of guardians were formed, and a Central Poor Law Board was created with very large powers of administration. But, large as those powers are, I cannot find anything in the Act of 1834, or in any later Act, which has enlarged the class of persons entitled to relief under the former statutes. I can find no section which entitles able-bodied persons to support out of the rates, if they can obtain work and can support themselves and their families, if they choose to do so. Sect. 54 of the Act of 1834 authorizes overseers to give temporary relief, but not money, in cases of "sudden and urgent necessity." The object of this section is to enable overseers to act without reference to the guardians in cases which admit of no delay. The same section authorizes justices to order medical relief in case of sudden and dangerous illness. This section has no immediate bearing on the question which has to be decided on this appeal, and would not require further notice, except for the contention that the case before us was one of urgent necessity. I will examine this contention presently.

Having ascertained the classes of persons entitled to relief under the Poor Law Statutes, it is necessary to discover whether the Local Government Board can authorize relief to be given to persons not entitled to demand it, and to what extent this power, if it exists, can be exercised. The powers of the Local Government Board (who now represent the Poor Law Commissioners) are very large and must be carefully examined. The enactments which confer special powers upon them relating to this subject are 4 & 5 Will. 4, c. 76, ss. 15, 42, 52, and 105, and 11 & 12 Vict. c. 91, s. 4, amended by 29 & 30 Vict. c. 113, s. 5. Sect. 15 of 4 & 5 Will. 4, c. 76, clearly confers no power to grant relief to any person not entitled to relief under the Poor Law Statutes. It is in express terms confined to the administration of relief according to those statutes, and there is a remarkable provision at the end of the section to guard against the supposition that anything in the Act itself should enable the Commissioners to interfere in any individual case for the purpose of ordering relief. Sect. 42 relates to regulations to be observed in workhouses, and has no direct bearing

on this case. This section in no way authorizes relief to be given to persons not entitled to it by law. Sect. 52 is more important, for it relates to outdoor relief, and gives the Commissioners very wide powers. But here, again, they are restricted to making regulations declaring "to what extent and for what period the relief to be given to able-bodied persons or to their families in any particular parish or union may be administered out of the workhouse." This language assumes that the persons referred to are entitled to relief, and enables rules to be made for their relief out of the workhouse, instead of in it. But I cannot read this section as empowering the Commissioners to order relief to be given to persons not entitled to relief at all under the statutes relating to the poor. Sect. 52, like the others already noticed, gives powers of administering those laws, but confers no power to alter them. That section enacts that relief given contrary to the regulations shall be deemed unlawful and shall be disallowed in the accounts, but the section contains a proviso enabling the local authorities to depart from the regulations of the Commissioners in cases of emergency, and authorizes the Commissioners to approve of such a departure, and any relief so given and approved "if otherwise lawful" is not to be deemed unlawful or to be disallowed. So that even in cases of emergency no relief can be lawfully given except to persons entitled to it under the poor law statutes. The recital at the commencement of s. 52 of 4 & 5 Will. 4, c. 76, refers to the abuse of the powers to grant outdoor relief conferred by the statutes of George III., to which I have already referred. But, bearing them in mind, and attending as we ought to the recital (which, I am sorry to say, is omitted from the last edition of the revised statutes), I cannot arrive at the conclusion that the Commissioners appointed under 4 & 5 Will. 4, c. 76, to carry out the improvements made by it are empowered to extend the scope of the poor law statutes by their application to persons not entitled to relief under them. This general conclusion, arrived at from a study of the language of the sections referred to, is strengthened by s. 105, which prohibits the removal of illegal rules by a certiorari into any Court except the Queen's Bench. This shews

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that the Commissioners have no legislative, as distinguished from administrative, power. If further authority for this proposition is wanted it is to be found in *Waddington* v. *City of London Union* (1), where a retrospective rate, alleged to have been authorized by regulations made by the Commissioners, was held illegal.

I pass now to another statute, which goes further than any to which I have yet referred: I mean the Poor Law Audit Act, 1848, s. 4, relating to the audit of poor law accounts. Under this Act an unlawful expenditure properly disallowed by the auditor may, nevertheless, be allowed by the Commissioners on an appeal from his decision. If the Commissioners find the subject-matter of the disallowance was incurred "under such circumstances as to make it fair and equitable that such disallowance shall be remitted" they have the power to remit it—i.e., to authorize the allowance of the unlawful and properly disallowed expense. This is a very large power. It is now intrusted to the Local Government Board, and with the exercise of it, when it arises, this Court cannot interfere. But the remission of the disallowance of an expense unlawfully incurred no more renders lawful the incurring of the expense than a pardon for a crime renders lawful the past criminal conduct of the person pardoned. The power of the Commissioners to allow an unlawful expense does not arise until that expense has been incurred and has been disallowed; and if the High Court has jurisdiction to prevent the improper expense, that jurisdiction is not taken away by the power given to the Commissioners to allow the expense if it has been illegally made. So, if the illegal payment is a ground for indictment, its allowance by the Commissioners will afford no legal answer to the indictment. At the same time, the existence of this power ought to make the Court very careful in granting injunctions relating to poor law relief.

Having now examined all the statutory enactments which have to be considered, I pass to those regulations made by the Commissioners which are applicable to the Merthyr Tydfil Union. They are dated October 1, 1870, and October 29, 1870.

(1) (1858) E. B. & E. 370, 399–400.

As might be expected, they relate to the mode of administering relief to poor persons in the union. They are purely administrative orders; they in no way (inadvertently or otherwise) purport to authorize the granting of relief to persons not entitled to it. Art. 1 of the order of October 1, 1870, says that "every able-bodied person requiring relief" shall be relieved wholly in the workhouse, except in certain specified cases, the first of which is "where such person shall require relief on account of sudden and urgent necessity." The expression "every person requiring relief" in the first article cannot mean every person asking for relief, whether entitled to it or not. The regulations relate to the working of the poor laws, and the expression in question must in reason be confined to those persons who are entitled to relief under the poor laws, and who require that relief. Again, the first exception refers only to such emergencies as require outdoor relief instead of indoor relief. It has reference to the necessities of those entitled to relief. It in no way enlarges the class of persons entitled to relief under the Poor Law Statutes. If the workhouse is full, the exception justifies giving outdoor relief to poor persons entitled to relief who cannot be received into the workhouse; and, if the workhouse is not full, a poor person entitled to relief may need it so urgently as to entitle him to outdoor relief before he can reach the workhouse. But to construe the exception as justifying the giving relief in any shape to persons, few or many, who are not entitled to any relief at all is entirely to mistake the object of the exception, and to put upon its language a meaning which it will not bear. The order of October 29, 1870, is again a merely administrative order, directing how outdoor relief is to be given to the poor who are entitled to it. As I understand the order, outdoor relief is only to be given to the able-bodied poor who are entitled to relief, and who will do a certain amount of work. But, if they comply with that condition, they are entitled to relief for themselves and their families, partly in food, clothing, and articles of necessity and partly in money, as stated in the order.

I now proceed to consider what has been done in this case.

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There is no conflict of evidence; all the material facts are admitted. Relief has been given—(1.) To wives and children reduced to destitution by the strike; (2.) to able-bodied men thrown out of work by the strike and unable to obtain work and maintain themselves while it lasted. Both these classes of persons were entitled to relief under the statute of Elizabeth, and there has been no unlawful expenditure of the poor-rates in supporting them. It is true that the wives and children of the strikers were not themselves applicants for relief, and were relieved indirectly through the strikers; but this only amounts to an impropriety in the mode of relieving them. This impropriety is not a matter for this Court's interference. It is unimportant in considering whether the wives and children were entitled to relief or not. But the colliers who struck work were able-bodied men who might have obtained work, and who might have maintained themselves and their families. These men, when relieved, were not so reduced by want as to be unable to keep themselves and their families off the rates, and it was their clear duty to do so if they could. In my opinion, these persons had no right to be relieved when they applied for relief, and the guardians were not justified, either by the Poor Law Statutes or by any regulations made under them, in affording that relief. The evidence does not shew that the colliers were physically too weak and ill to work, nor that any of them were prevented by fear of violence from accepting work within their reach. They are described as destitute, and in one sense they were so; they had neither food nor money. But they were able-bodied men physically well and able to work; and the answer to the fourth interrogatory shews that they might, if they had chosen, have obtained work at wages sufficient to support themselves and their families. It was contended that this was only true if they all went to work in a body; and that it was not true of them individually. I cannot read the answer to the fourth interrogatory as open to this construction. No one of the strikers was willing to accept work, unless the others did the same; and no one could have worked the colliery without others. But the evidence shews, in my opinion, that each and every striker could, if he had

chosen, have kept himself and his family off the rates. I draw no distinction between strikers and other able-bodied men who can support themselves, but who will not. There is no difference, so far as the poor law is concerned, either for better or for worse, between men on strike and other men who can, but will not, support themselves. To use the rates to support strikers or any other persons able to support themselves is, in my opinion, illegal; although, rather than let even such persons starve, relief may be given to them when physically unable to work. This anomaly I have already alluded to.

As I understand the judgment of Romer J., we do not differ in holding that, speaking generally, it is wrong to grant relief to able-bodied persons who can obtain work and support themselves and their families. But he has treated this case as one of urgent necessity, and as consequently justifying the guardians in granting relief as they did. Here I am unable to follow him. I have already pointed out that the guardians were justified in relieving the wives and children, even of the strikers, and in granting relief to non-strikers thrown out of employment by the strike. These persons were all entitled to relief, without reference to any question of sudden emergency. The numbers of them might, and very likely did, create a sudden emergency entitling them to outdoor, as distinguished from indoor, relief. But that is a comparatively immaterial matter, and one about which the Court ought not to concern itself. But, if a poor person physically able to work can obtain work and so support himself and his family there is no urgent necessity, nor any necessity at all, for granting him relief. Moreover, numbers do not give a right to relief to persons not individually entitled to relief. The sense in which the colliers were destitute I have explained already. They were not so weak as to be unable to work, and they were not relieved on the ground that they were physically in that condition. They were relieved before they were entitled by law to relief, and, I suppose, from fear of a disturbance and of violence. I quite agree with Romer J. that it is not the province of the High Court to administer the poor laws, nor to interfere with guardians in the performance of their very difficult duties, the performance of which demands

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great judgment, sympathy, and discretion. Still less can the High Court interfere with the exercise by the Local Government Board of their powers to make regulations for the relief of persons entitled thereto by the Poor Law Acts. Moreover, the allowance by the Board of expenses unlawfully incurred cannot be controlled by the Court. This prevents the Court from ordering the guardians to make good any expense which has been incurred, and which the Local Government Board may, in their judgment, think it right to allow. But this action was brought to restrain the guardians from misapplying the rates by granting relief at a great expense to persons not entitled thereto. Certiorari is no adequate remedy in such a case, nor is there any other. The jurisdiction of the High Court to grant an injunction to restrain an unlawful application of rates cannot be doubted, and the observations in *Grand Junction Waterworks Co.* v. *Hampton Urban Council* (1) are not applicable to such a case as the present. The guardians, taking, in my opinion, an erroneous view of their power and duty to grant relief in such a case as this, contended that it was competent for them, and indeed their duty, to grant relief on the ground of emergency. In my opinion they were wrong, so far as the colliers themselves were concerned, and, as the defendants from first to last have maintained that they were in the right throughout, I think the Court ought to make a declaration to shew that the action was properly brought, and to prevent any misconception as to the illegality of the conduct of the guardians. Such a declaration is not open to the objection against making abstract declarations on matters not within the Court's jurisdiction as in *Barraclough* v. *Brown* (2), an objection which was forcibly pointed out by Lord Davey. (3) But the declarations asked by the plaintiffs are much too wide and might be misunderstood. Labour yards may well have been wanted for persons entitled to relief, because, although able to work, they were unable to obtain work and could not be taken into the workhouse.

The proper order will be as follows: Allow the appeal and

(1) [1898] 2 Ch. 331. (2) [1897] A. C. 615.
(3) [1897] A. C. 623.

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discharge the judgment appealed from. Declare that the payment by the defendants out of the poor-rates of any money for setting to work or for the relief of able-bodied men, who were at the time able to obtain and perform work at wages sufficient to support themselves (and their wives and families if any), was unlawful and ought to be disallowed by the auditor on auditing the defendants' accounts. But this declaration does not include relief given to or for the wives and children of such men, and the declaration is to be without prejudice to and is in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under the statute 11 & 12 Vict. c. 91, s. 4, or any other statute enabling them so to do. The defendants must pay the costs of the appeal, but the relief claimed was so much too wide that each party must bear his own costs of the action.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Bell, Brodrick & Gray, for Linton & C. & W. Kenshole, Aberdare; Wrentmore & Son, for Frank James & Sons, Merthyr Tydfil.*

W. L. C.

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BYRNE J.
Jan. 19, 24, 30.
C. A.
March 7, 8.

[1899 B. 5027.]

Partnership—Dissolution—Right to Use of Name of Old Firm—Solicitors' Business.

Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, and without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability.

Whether there will be any such risk is a matter to be determined having regard to the circumstances of each case.

In 1882 a partnership of solicitors was constituted, the partners being William Burchell the elder, William Burchell the younger, the defendant W. G. Wilde, and the plaintiffs, J. W. Burchell and C. T. D. Burchell, and they carried on business under the style of "Burchell & Co."

In June, 1893, William Burchell the elder having died and William Burchell the younger having retired, the plaintiffs and the defendant

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W. G. Wilde agreed to continue in partnership under the style of "Burchell & Co."

In the year 1899 the partnership was dissolved by consent, there being no sale of the goodwill or assets and no provision as to the use of the firm name.

The plaintiffs then proceeded to carry on business at the old office as "Burchells & Co.," and the defendant W. G. Wilde and his son (whom he had taken into partnership) at new offices as "Burchell & Co."

The plaintiffs claimed the exclusive right to use the name "Burchell" or "Burchells," and to restrain the defendants from using either of those names in any way as part of their firm name:—

Held, by Byrne J., on motion for an injunction, that the right to the injunction depended upon the plaintiffs' establishing that any use of the word "Burchell" as part of the name of the defendants' firm would expose the plaintiffs to risk of liability, and, the Court not being satisfied that either of the plaintiffs would be under any tangible risk of liability if the defendants were (as they said they were willing to do) to practise as "Burchell, Wilde & Co.," especially if the plaintiffs were to use a style carrying their initials, or were to take the name of "Burchells & Burchell," made no order on the motion:

Held, by the Court of Appeal, that, subject to the above limitation, the defendants were entitled to use the name "Burchell & Co.," though it would be more satisfactory if they would undertake to continue to use (as they had done since the hearing by Byrne J.) the name "Burchell, Wilde & Co."

Gray v. *Smith*, (1889) 43 Ch. D. 208, distinguished.

The case of *Banks* v. *Gibson*, (1865) 34 Beav. 566, must be read subject to the qualification that the use of the old name must not expose the other partners to liability.

MOTION to restrain the defendants from carrying on business as solicitors under the name or style of "Burchell & Co.," or under any other name or style of which the name of "Burchell" or "Burchells" formed part.

In 1847 William Burchell the elder (an uncle of the plaintiffs) was carrying on business as a solicitor in partnership with two gentlemen named Kilgour and Parson under the style of Burchell, Kilgour & Parson.

In 1851 Kilgour and Parson retired from practice, and William Burchell the elder practised alone in his own name until 1857, when a new partnership was constituted between William Burchell the elder, James Burchell (father of the plaintiff James Ward Burchell), and William Burchell the younger. These partners carried on business at No. 5, The Sanctuary, Westminster, under the style of "Burchells."

In 1874 James Burchell retired, and the plaintiff James Ward Burchell was admitted a partner. The firm so constituted continued in business still as "Burchells" till 1882. In that year a new partnership was constituted, the partners being William Burchell the elder, William Burchell the younger, the defendant William George Wilde, and the plaintiffs James Ward Burchell and C. T. D. Burchell, and they carried on business under the style of "Burchell & Co."

William Burchell the younger retired from the firm in March, 1884, and William Burchell the elder died in 1888.

By an agreement, dated June 21, 1893, the plaintiffs and the defendant William George Wilde agreed to continue in partnership as solicitors in continuation of their then partnership for the term of ten years from March 31, 1893, under the style of "Burchell & Co.," at No. 5, The Sanctuary.

The defendant William Wilde, who was a son of the defendant William George Wilde, had then been admitted as a solicitor, and an agreement was at the same time made for the introduction by any partner, with the consent of the others, of a son who had been admitted, upon certain terms, and that if William George Wilde should not during his life have introduced a son into the firm, the defendant William Wilde should on the death of his father be admitted as a partner upon certain terms.

In the year 1899 differences arose between the partners, and the partnership was dissolved by consent as from December 9, 1899.

Heads of an agreement for dissolution were, on September 15, 1899, signed by the partners, various points being left to the determination of an arbitrator. In the opinion of the Court of Appeal, the effect of the agreement, coupled with the arbitrator's award afterwards made, was that the goodwill of the business was not to be sold for the benefit of the partners, but was to be divided between them in so far as it was incident to the possession of the clients' documents, and no provision was made as to the use of the firm name. The plaintiffs acquired the offices at No. 5, The Sanctuary, at a valuation.

At the date of the dissolution the defendant W. G. Wilde

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was entitled to a larger share of the profits than any of the other partners, and he had been a partner in the successive partnerships since 1882, when the style was changed from "Burchells" to "Burchell & Co."

Notice of dissolution was duly signed and gazetted, and independent circulars were sent by the plaintiffs and the defendant W. G. Wilde respectively to every client of the old firm, stating the fact of the dissolution, and also respectively giving notice of the names of the partners constituting the new firms respectively, and the addresses of the new firms, and the styles under which they respectively intended to carry on business.

The plaintiffs, with a new partner also named "Burchell," continued to carry on business at the old offices as "Burchells & Co.," and the defendants (the defendant William Wilde having been taken into partnership by his father) began to carry on business at 36, Victoria Street, Westminster, under the style of "Burchell & Co.," and both the plaintiffs and the defendants were willing to make some modification in their respective firm names so as to render the resemblance less close; but the plaintiffs claimed the exclusive right to use the name "Burchell" or "Burchells," and to restrain the defendants from using either of these names in any way as part of their firm name.

The motion came on for hearing before Byrne J. on January 19, 1900.

Swinfen Eady, Q.C., and *W. E. Vernon*, for the plaintiffs. The defendants are representing to the world at large that they are carrying on the old business, and they have no right to do this. There has been no assignment of the goodwill, and the defendants have no right to carry on business under the old partnership name; even if the goodwill had been assigned they would not be entitled to use the name of the old partnership, if by so doing they exposed the plaintiffs to any liability: *Gray* v. *Smith* (1); *Thynne* v. *Shove*. (2) By using the old partnership name the defendants are exposing the plaintiffs to liability.

(1) 43 Ch. D. 208. (2) (1890) 45 Ch. D. 577.

[They also referred to *Scott* v. *Rowland* (1), *Chatteris* v. *Isaacson* (2), *Chappell* v. *Griffith* (3), and *In re David and Matthews.* (4)]

Levett, Q.C., and *Norton, Q.C.*, for the defendant, W. G. Wilde. The agreement for dissolution is silent as to the style under which the parties are to carry on business, and when a partnership is dissolved each partner, in the absence of agreement to the contrary, is entitled to use the name of the firm: *Levy* v. *Walker.* (5) The name or style of the old firm forms an undivided asset of the partnership which belongs to the partners in common after the dissolution: *Banks* v. *Gibson.* (6) The plaintiffs have not shewn that they will incur any liability by our using the name of the old firm, and therefore the defendants are entitled to use it. The motion should be refused.

Alexander, Q.C., and *T. B. Napier*, for the defendant William Wilde.

Swinfen Eady, Q.C., in reply.

Cur. adv. vult.

Jan. 30. BYRNE J., after stating the facts, proceeded as follows:—The cases mainly relied on by the defendants are *Banks* v. *Gibson* (6) and *Levy* v. *Walker.* (5) In *Banks* v. *Gibson* (6), a case which has often been cited, the short facts are as follows: Mr. Banks and Mr. Gibson had been in partnership. Mr. Banks died. There was a provision enabling his executor to continue the business with the survivor. The business was continued under the same style, "Banks & Co.," between Gibson and Banks' widow, and for some few years the business was so carried on. Then there was an agreement for a division of the stock-in-trade, there was a dissolution, and it was also agreed that the trade labels and stamps should be destroyed, and each party at different places went on carrying on business as Banks & Co. Lord Romilly M.R. held that the plaintiff (that is, Mrs. Banks, the widow and administratrix of the original Banks), was not entitled to require the

(1) (1872) 26 L. T. 391.
(2) (1887) 57 L. T. 177.
(3) (1885) 53 L. T. 459.
(4) [1899] 1 Ch. 378.
(5) (1879) 10 Ch. D. 436.
(6) 34 Beav. 566.

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defendant to discontinue using the style of "Banks & Co.," and he says in the course of his judgment (1): "If, by arrangement, one partner takes the whole concern, there must be a valuation of the whole, including the name or style of the firm. But if the partners merely divide the other partnership assets, then each is at liberty to use the name just as they did before. It is the same as if two persons, who alone carried on the business of Child & Co., thought fit to separate, each would be entitled to use the name by which they carried on their business."

Now, *Banks* v. *Gibson* (2) was referred to in *Levy* v. *Walker*. (3) The latter case is well known and often cited, so that I shall not go through the facts of it. In the course of the argument James L.J. said (4): "I have always understood that if a partnership is dissolved, each partner, in the absence of agreement to the contrary, may use the name of the firm." Then counsel, who was arguing the case, says: "I know of no case which lays down that doctrine to its full extent, where the partnership name was made up of the names of the partners, and was not a fictitious name, such as the 'Bonbon Manufacturing Company.'" Then the Lord Justice refers to *Banks* v. *Gibson* (2), and the counsel says: "That case is distinguished by the Vice-Chancellor"—that is, Hall V.-C.—in the case of *Levy* v. *Walker*. (3) Then the matter passes off there; but it was decided that one of the old partners was not after a sale entitled to restrain the business being carried on in the old name; and in the course of the case it is pointed out that there is no liability incurred by the person who had changed her name from Charbonnel to Levy.

As in *Levy* v. *Walker* (3) and in *Banks* v. *Gibson* (2), the firm name in the present case, "Burchell & Co.," was not the real name or names of anybody. It was compounded of or derived from the surname, that is a portion of the name common to two of the partners, combined with the words "& Co.," these latter words being intended to refer to such of the partners not indicated by the singular "Burchell" as bore

(1) 34 Beav. 569.
(2) Ibid. 566.
(3) 10 Ch. D. 436.
(4) Ibid. 445.

that surname, and the remaining partner, whose name was "Wilde."

In *Gray* v. *Smith* (1), where three persons, Gray, Smith, and Bennitt, were partners under the style of "Gray, Smith & Bennitt," Smith and Bennitt agreed to retire from the firm and to sell their shares and interest in it to Gray, there being no express agreement to sell the goodwill, it was held by the Court of Appeal that Gray had no right to use the name of the old firm so far as Bennitt was concerned. No question was argued as between Gray and Smith. It appears from the statement of the facts at page 210 of the report that the plaintiff Gray gave evidence at the trial that it was a term of the agreement between him and the defendants that he should be entitled to use the firm name of Gray, Smith & Bennitt until the retiring partners had been paid out; but it appears from the judgment of Cotton L.J. that on the appeal the plaintiff did not insist (2) "on any right to use the defendant's name beyond such right (if any) as according to the general law is to be inferred from the agreement to retire," and the Lord Justice points out that a contract to retire from the firm has not the same effect as a contract expressly bargaining for the assignment of the goodwill, and says (3): "The agreement by Bennitt to withdraw from the firm entitles the plaintiff to an assignment of Bennitt's share of the stock, but does not imply that the plaintiff is to be at liberty to continue to use Bennitt's name." Referring to *Levy* v. *Walker* (4), the Lord Justice points out that "Mr. and Mrs. Levy could not be subjected to any liability by the use of the name of 'Charbonnel & Walker' by the defendant, as the use of that name could not suggest to any one that Mr. or Mrs. Levy was a partner." *Banks* v. *Gibson* (5) was cited in *Gray* v. *Smith* (1), but was not referred to in the judgment.

The case of *Levy* v. *Walker* (4) has recently been carefully examined by Stirling J. in *Thynne* v. *Shove* (6), and I adopt the view taken by him of the effect of the decision in that

(1) 43 Ch. D. 208.
(2) Ibid. 220.
(3) Ibid. 221.
(4) 10 Ch. D. 436.
(5) 34 Beav. 566.
(6) 45 Ch. D. 577.

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case—namely, that it is not to be read as determining that the purchaser of a business and goodwill is entitled to use the style of the old firm if that style includes the name of a living person, or if the use of it would expose the owner of such name to liability. The actual case of *Thynne* v. *Shove* (1) was one where a man named "Arthur Thynne," carrying on business as "A. Thynne," simply sold to a man named "Shove," who proceeded to carry on business as "A. Thynne." The rule in the case of a sale to a third person is thus summed up by Stirling J. (2): "He" (the plaintiff) "has assigned the goodwill of his business to the defendant; and by virtue of that assignment the defendant, in carrying on the business, has the right to use the name of the assignor for the purpose of shewing that the business is the business formerly carried on by the assignor; and he has the full right so to use it, subject to this: that he must not exercise that right so as to expose the assignor to any liability by holding him out to be the real owner of the business. That is the only limit of the defendant's right to use the plaintiff's name." I accept that as a clear statement of the result of the authorities.

Upon principle it is difficult to see why the rights of any partner upon a dissolution, under circumstances like those in the present case in reference to the use of the firm name, should be greater than the right of a purchaser who has bought the goodwill; and, having regard to the effect of more recent decisions, I think *Banks* v. *Gibson* (3) must be read subject to the qualification that the use of the old name must not expose the other partners to liability.

It does not appear from the report of *Banks* v. *Gibson* (3) that the question of subjection of the partner whose name was Banks to liability came under consideration.

But the plaintiffs' right to the injunction depends upon their establishing that any use of the word "Burchell" as part of the name of the defendants' firm would expose them to risk.

I cannot say that I am satisfied that any of the plaintiffs

(1) 45 Ch. D. 577. (2) 45 Ch. D. 580.
(3) 34 Beav. 566.

would be under any tangible risk of liability if the defendants were to practise as "Burchell, Wilde & Son" or "Burchell, Wilde & Co.," especially if the plaintiffs were to use a style carrying their initials, or were to take the name of "Burchells & Burchell," as I understand they are not unwilling to do.

There is a case not very dissimilar to the present, which was decided by Kay J., which is useful upon this point—I refer to *Chappell* v. *Griffith*. (1) In that case a firm of solicitors, three partners, carried on business under the style of "Chappell, Son & Griffith." The senior partner, Chappell, died, and the business was carried on by the son and the junior partner under the same style for upwards of three years. The partnership was then dissolved, an agreement being executed providing for the dissolution, but containing no reference to the goodwill of the business, or to the sale or disposal thereof. After the dissolution the business of a solicitor was carried on by Chappell's son on the premises held by the original firm under the style of Chappell & Son; Griffith had taken offices a few doors off, also carrying on the business of a solicitor. He took the style of Chappell & Griffith. To this Chappell objected, and commenced an action, and gave notice of motion for an interim injunction. The report is a long report, and I do not propose to go through all that was said there; but in the course of giving his judgment Kay L.J. (then Kay J.) had occasion to consider what, in the case of solicitors, was the probability of liability under such circumstances, and he says (2): "On the assumption that each of them was entitled to use the old style, he" (Griffith) "points out that it would be better perhaps to make a slight deviation in each case from that old style, so that there might be no chance of confusion, and obviously for the purpose of preventing any risk of their being subjected to liability in connection with the transactions of either in carrying on a separate business. This, in the case of a solicitor's business, would probably, in any event, be slight. The letter was, as I have said, a very fair one. He also sent to all the clients of the old business a circular which told them of the dissolution, and that he proposed to carry on the business of a solicitor by

(1) 53 L. T. 459. (2) 53 L. T. 462.

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himself. It also told them of the style which, in carrying on the separate business, he intended to adopt. On the evidence before me I must assume that every client of the old firm received a copy of that circular." Then in another passage in his judgment he says (1): "This is not the sort of business which would expose a man to pecuniary risk in that sense."

Now, the circumstances of the present case are very similar to the circumstances in that, and I asked counsel to point out the nature of the liability of risk which would be incurred by the plaintiffs in the event of the defendants using the name "Burchell" as part of the style of their firm, and I think I am right in saying that no case was suggested to me where there was any probability of liability being established against either of them; but it was suggested that unfounded proceedings might be taken against them owing to the fact of the name being used in connection with the new firm, and it was said that no man ought to be put even to the risk of having unfounded litigation brought against him. Now, I think, in considering this matter, you have to look at the nature of the business carried on, and to see that what is anticipated is not merely annoyance and trouble, but is something in the nature of substantial pecuniary risk; and in the present case I am not satisfied that if the defendants use the name "Burchell" in such a way as I suggest, as "Burchell, Wilde & Son" or "Burchell, Wilde & Co.," the plaintiffs would come under any risk of pecuniary liability so as to entitle them to an injunction on that ground against the defendants.

It must be remembered that there is no whole name of an individual but only a surname, common not only to the plaintiffs but to dead partners in the old firm, and to at least one other "Burchell" whose name appears in the Law List.

Upon the whole case I think I ought to make no order on the motion.

G. M.

C. A. The plaintiffs appealed. The appeal came on for hearing on March 7, 1900.

After the judgment of Byrne J. the defendants adopted

(1) 53 L. T. 463.

Burchell, Wilde & Co. as their firm name, though they had not bound themselves to use that name.

Swinfen Eady, Q.C., and *W. E. Vernon*, for the plaintiffs. The defendants are not in the absence of agreement entitled to use the old firm name. The name Burchell is that of the plaintiffs, and the use of it by the defendants may injure the plaintiffs. The use of the name by the defendants would represent that their firm is the same as the old firm of Burchell & Co., and would expose to liability the plaintiffs who were known as members of the old firm. The defendants have no right to represent that they have acquired the goodwill of the business of a partnership when in fact they have not done so. When a partner retires from a firm and does not assign the goodwill to the continuing partner, that partner has no right to use the retiring partner's name: *Gray* v. *Smith* (1); *Thynne* v. *Shove* (2); *In re David and Matthews* (3); *Scott* v. *Rowland* (4); *Chatteris* v. *Isaacson* (5); *Levy* v. *Walker* (6); *Banks* v. *Gibson* (7); *Chappell* v. *Griffith.* (8) A client of the old firm who had not received notice of the change of partners would be entitled to treat any apparent member of the old firm as still a member of the new firm which was carrying on business under the old name. The other former partners would incur risk, and this is the true test: Lindley on Partnership, 6th ed. pp. 448, 604; Partnership Act, 1890 (53 & 54 Vict. c. 39), ss. 14, 36.

Levett, Q.C., and *Norton, Q.C.*, for the defendant W. G. Wilde, and

Alexander, Q.C., and *T. B. Napier*, for the defendant W. Wilde, were not called upon.

LINDLEY M.R. We must first ascertain the facts, and then see whether the learned judge was right in the view which he has taken.

The business with which we have to deal is a solicitors'

(1) 43 Ch. D. 208.
(2) 45 Ch. D. 577.
(3) [1899] 1 Ch. 378.
(4) 26 L. T. 391.
(5) 57 L. T. 177.
(6) 10 Ch. D. 436.
(7) 34 Beav. 566.
(8) 53 L. T. 459.

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business of old standing. It was formerly carried on under the name of "Burchells." In 1882 the defendant William George Wilde joined the firm, and from that time until the recent dissolution the business has been carried on under the name of "Burchell & Co." by him and his partners. One of the five partners having died and another having retired, an agreement was in June, 1893, entered into between the plaintiffs, J. W. Burchell and C. T. D. Burchell, and the defendant W. G. Wilde, extending the term of their former partnership for another ten years, and there was a provision for the ultimate introduction of the defendant William Wilde into the partnership.

Unfortunately differences arose between the partners which led to a memorandum of dissolution being signed on September 15, 1899. The heads of that memorandum were of a very sketchy character, but there was a clause to the effect that all disputes should be referred to an arbitrator, under which the arbitrator has made an award upon some points, and, taking the memorandum and the award together, it is pretty plain what the arrangement was. Nothing was said either in the memorandum or in the award about the continued use of the firm name. Nor was anything said in terms about the goodwill of the business. But the agreement, as expounded by the award, amounts to this—that the clients and their documents were to be divided, some of them going to the Burchells and some to W. G. Wilde. There were also provisions for the books of the firm being handed over to a Mr. Gardiner, with liberty to either of the partners to inspect them. Some of the older books were to be left with the Burchells, they being under an obligation to give extracts to Wilde if he should want them. What does that arrangement mean? It involves this—that the goodwill of the business was not to be sold for the benefit of the partners. The goodwill was to be divided between them in so far as it was incident to the possession of the clients' papers. That is a most important fact. It was left entirely undecided what was to be done about the use of the name of the firm. But if you come to the conclusion (about which there can be no doubt)

that the goodwill apart from the benefit of the firm name, as to which nothing is said, was not to be sold, but was to be divided between the partners, what is the result? It appears to me to follow that each partner could use the name of the old firm. They had become tenants in common of that asset, and each partner was entitled to enjoy that asset, subject only to a limitation, which I will mention presently. I cannot see any legal answer to this position, and this I think explains the decision of Lord Romilly M.R. in *Banks* v. *Gibson* (1), and clearly distinguishes the present case from *Gray* v. *Smith* (2) and the other cases which have been cited. The limitation to which I have referred is this, and I think Byrne J. has fully recognised it. Apart from some express stipulation, a man has no right to hold out his late partner, or indeed any one else, as his partner in business, and, if it could be shewn that the defendants were holding out the plaintiffs as their partners, I should think (subject to what the defendants, whom we have not heard, might say) that the plaintiffs would be entitled to an injunction. But in my opinion the plaintiffs have not established anything of the kind.

What are the defendants doing? They have been using the name of the old firm, "Burchell & Co." They are in fact now carrying on business under the name of "Burchell, Wilde & Co.," and there is no reason to suppose that they intend to go back from that. They have not undertaken to use that name; it would have been more satisfactory if they had, and perhaps they will not object to do so after hearing the judgment of the Court. How does that hold out these particular plaintiffs as the defendants' partners? Considering the history of the use of the name "Burchell," it does not hold them out as the defendants' partners at all; and even if it could do so, let us see what the defendants have done. They have taken care by their circulars and by the letters which they have sent to the best of their ability to all the old clients of the firm to tell those old clients who are the members of their firm of "Burchell & Co.," who are carrying on business in Victoria Street. There is no holding out in any businesslike sense of the plaintiffs as

(1) 34 Beav. 566. (2) 43 Ch. D. 208.

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their partners, and I cannot see any substantial or practical risk which the plaintiffs will incur by reason of the conduct of the defendants. I do not say that you cannot imagine a possible case in which some one might be foolish enough to bring an action against the Burchells upon the ground that they are continuing partners with the Wildes. But, bearing in mind the nature of a solicitor's business, and that the old clients if they continued to employ the Wildes would see from their letters who the partners are, this imaginary possibility ought, in my opinion, to be discarded. There is practically no risk at all.

I think that Byrne J. has decided the case upon the correct principle. I agree with him that, although you may imagine possible risks, they are not substantial in a business sense. As to the goodwill of the business and the use of the firm name, apart from any liability to which they may be exposing the plaintiffs, the defendants are in the right, and to my mind that liability is so shadowy that the appeal ought to be dismissed.

I repeat that it would be more satisfactory for every one if the defendants would undertake to continue to use the name "Burchell, Wilde & Co."

As to William Wilde, the son, his father has a right to take him into partnership if he chooses to do so.

RIGBY L.J. I agree.

VAUGHAN WILLIAMS L.J. I also agree.

Solicitors: *Burchells & Co.; Burchell, Wilde & Co.*

W. L. C.

C. A.
1900
Feb. 13, 16
March 8.

In re MARYON-WILSON. WILSON *v.* MARYON-WILSON.

[1899 M. 1155.]

Revenue—Settlement Estate Duty—Incidence—Settlement by Deed inter vivos—Covenant by Testator for Payment of a Specified Sum to Trustees of Settlement after his Death "without any deduction"—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5, 6 *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4; *ss.* 9, 14 *sub-s.* 1—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

A father on the marriage of his daughter covenanted with the trustees of her marriage settlement that his executors should within six months after his death pay to them the sum of 25,000*l.* "without any deduction," to be held by them upon the trusts of the settlement.

By his will the father devised lands to trustees for the term of 2000 years, upon trust to raise thereout and to pay to the trustees of the settlement the 25,000*l.*, with interest from his death.

On the death of the testator the Crown claimed, under s. 5 of the Finance Act, 1894, the payment of settlement estate duty in respect of the 25,000*l.*:—

Held, that, independently of the words "without any deduction" in the covenant, the settlement estate duty must have been paid out of the 25,000*l.* and not out of the testator's residuary estate.

But, *held*, that, by reason of those words, the settlement estate duty must be paid out of the residuary estate, or that if the 25,000*l.* was raised by the trustees of the term they must raise also the settlement estate duty in respect of the 25,000*l.*

Decision of Kekewich J., [1899] 2 Ch. 489, on the latter point reversed.

In re Webber, [1896] 1 Ch. 914, disapproved.

APPEAL against a decision of Kekewich J. (1), where the facts are fully stated.

For the purposes of the present report the following summary will be sufficient:—

By a settlement dated July 23, 1895, made on the marriage of one of his daughters, Sir Spencer Maryon-Wilson covenanted with the trustees of the settlement that his executors or administrators should, within six months after his death, pay to the trustees the sum of 25,000*l.*, with interest at 3½ per cent. per annum from the day of his death, "without any

(1) [1899] 2 Ch. 489.

C. A. 1900 MARYON-WILSON, *In re.* WILSON *v.* MARYON-WILSON.

deduction." The trustees were to hold the 25,000*l.* upon the trusts of the settlement.

By his will, dated August, 1896, Sir Spencer devised some freehold estates for the term of 2000 years to the persons whom he appointed his executors, upon trust to raise (inter alia) thereout and to pay to the trustees of the settlement the above-mentioned sum of 25,000*l.*, with interest from the testator's death. The testator died on December 31, 1897.

Estate duty was claimed by the Crown under the Finance Act, 1894, on the whole of the testator's estate, real and personal, including the above-mentioned sum of 25,000*l.* The Crown also claimed under s. 5 of the same Act settlement estate duty in respect of the 25,000*l.* The question then arose how the "settlement estate duty" ought ultimately to be borne. Kekewich J. held, and it was indeed admitted, that the "estate duty" as regarded the 25,000*l.* must be borne by the testator's general residuary estate.

The learned judge also held that the "settlement estate duty" must be borne by the 25,000*l.*, and not by the general residuary estate, and that the testator's covenant had been fully performed when the 25,000*l.* had been paid to the trustees of the settlement without any deduction in respect of "estate duty." The trustees of the settlement appealed from the latter part of the judgment. (1)

(1) By the Finance Act, 1894, s. 1, "In the case of every person dying after the commencement of this part of this Act, there shall, save as hereinafter expressly provided, be levied and paid, upon the principal value ascertained as hereinafter provided of all property, real or personal, settled or not settled, which passes on the death of such person a duty, called 'estate duty,' at the graduated rates hereinafter mentioned, and the existing duties mentioned in the first schedule to this Act shall not be levied in respect of property chargeable with such estate duty."

Sect. 2: "(1.) Property passing on the death of the deceased shall be deemed to include the property following, that is to say (inter alia):

"(*a*) Property of which the deceased was at the time of his death competent to dispose."

Sect. 5: "(1.) Where property in respect of which estate duty is leviable, is settled by the will of the deceased, or having been settled by some other disposition passes under that disposition on the death of the deceased to some person not competent to dispose of the property,—

"(*a*) a further estate duty (called settlement estate duty) on the principal value of the

Butcher, Q.C., and *Austen-Cartmell*, for the trustees of the settlement. The principle on which Kekewich J. decided that

settled property shall be levied at the rate hereinafter specified, except where the only life interest in the property after the death of the deceased is that of a wife or husband of the deceased; but

"(*b*) during the continuance of the settlement the settlement estate duty shall not be payable more than once."

Sect. 6: "(2.) The executor of the deceased shall pay the estate duty in respect of all personal property (wheresoever situate) of which the deceased was competent to dispose at his death, on delivering the Inland Revenue affidavit, and may pay in like manner the estate duty in respect of any other property passing on such death, which by virtue of any testamentary disposition of the deceased is under the control of the executor, or, in the case of property not under his control, if the persons accountable for the duty in respect thereof request him to make such payment."

Sect. 8: "(3.) The executor of the deceased shall, to the best of his knowledge and belief, specify in appropriate accounts annexed to the Inland Revenue affidavit all the property in respect of which estate duty is payable upon the death of the deceased, and shall be accountable for the estate duty in respect of all personal property wheresoever situate of which the deceased was competent to dispose at his death, but shall not be liable for any duty in excess of the assets which he has received as executor, or might but for his own neglect or default have received."

"(4.) Where property passes on the death of the deceased, and his executor is not accountable for the estate duty in respect of such property, every person to whom any property so passes for any beneficial interest in possession, and also, to the extent of the property actually received or disposed of by him, every trustee, guardian, committee, or other person in whom any interest in the property so passing or the management thereof is at any time vested, and every person in whom the same is vested in possession by alienation or other derivative title shall be accountable for the estate duty on the property, and shall, within the time required by this Act or such later time as the Commissioners allow, deliver to the Commissioners and verify an account, to the best of his knowledge and belief, of the property: Provided that nothing in this section contained shall render a person accountable for duty who acts merely as agent or bailiff for another person in the management of property."

Sect. 9: "(1.) A rateable part of the estate duty on an estate, in proportion to the value of any property which does not pass to the executor as such, shall be a first charge on the property in respect of which duty is leviable; provided that the property shall not be so chargeable as against a bonâ fide purchaser thereof for valuable consideration without notice."

"(4.) If the rateable part of the estate duty in respect of any property is paid by the executor, it shall where occasion requires be repaid to him by the trustees or owners of the property, but if the duty is in respect of real property, it may, unless otherwise agreed upon, be repaid by the same

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"estate duty" in relation to the 25,000*l.* ought to be borne by the residuary estate, applies equally to the "settlement estate duty." That duty ought to have been paid by the executors before they handed over the 25,000*l.*

Apart from the wording of the covenant, the executors were liable to pay the settlement estate duty. They were clearly liable to pay the estate duty on the 25,000*l.* out of the general estate, inasmuch as no deduction could be made for that sum in passing the Inland Revenue accounts. It was not a debt incurred for a consideration in money or money's worth, nor was it incurred for the testator's own use and benefit: Finance Act, 1894, s. 6, sub-s. 2, s. 7, sub-s. 1, and s. 8, sub-s. 3; *In re Gray* (1); *In re Parker-Jervis.* (2) Admittedly the 25,000*l.* is liable to settlement estate duty, and as settlement estate duty is only a further estate duty—Finance Act, 1894, s. 5, sub-s. 1—the executors must pay the settlement estate duty with the estate duty out of the general estate: *In re Webber.* (3) Sect. 19 of the Finance Act, 1896, was passed in consequence of this decision in order to sever the settlement estate duty from the estate duty, and make it payable out of the settled property; but that section has no application to the present case, as it applies only to a legacy or other personal property settled by the will of the deceased. At any rate, upon the

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instalments and with the same interest as are in this Act mentioned."

Sect. 14: "(1.) In the case of property which does not pass to the executor as such, an amount equal to the proper rateable part of the estate duty may be recovered by the person, who being authorized or required to pay the estate duty in respect of any property has paid such duty, from the person entitled to any sum charged on such property, (whether as capital or as an annuity or otherwise) under a disposition not containing any express provision to the contrary."

By the Finance Act, 1896, s. 19, "(1.) The settlement estate duty leviable in respect of a legacy or other personal property settled by the will of the deceased shall (unless the will contains an express provision to the contrary) be payable out of the settled legacy or property in exoneration of the rest of the deceased's estate.

"(2.) The settlement estate duty leviable in respect of any such legacy or property shall be collected upon an account setting forth the particulars of the legacy or property, and delivered to the Commissioners by the executor within six months after the death, or within such further time as the Commissioners may allow."

(1) [1896] 1 Ch. 620.
(2) [1898] 2 Ch. 643.
(3) [1896] 1 Ch. 914.

words of the covenant, "without any deduction," the settlement estate duty must be paid out of the general estate. This result follows upon whomsoever the liability falls to pay the settlement estate duty. It may be that the executors are liable, but can deduct the settlement estate duty from the 25,000*l.*, it being assumed that *In re Webber* (1) was wrongly decided upon this point. In this case the settlement estate duty is a notional deduction before the fund leaves the hands of the executors, and the words "without any deduction" prevent them from taking the settlement estate duty from the 25,000*l.* Or, it may be that the trustees of the term are liable under s. 8, sub-s. 4, of the Act of 1894, and the settlement estate duty becomes a notional deduction under s. 9, sub-s. 1. In this case also the words "without any deduction" prevent the settlement estate duty from being taken out of the 25,000*l.*

Warrington, Q.C. (*O. L. Clare* with him), for the respondents. This case is distinguishable from *In re Webber* (1), because here the fund was not settled by the will of the testator, and the executor is not liable to pay settlement estate duty in respect of property of which the testator was not competent to dispose at his death: s. 6, sub-s. 2, of the Act of 1894. Clause 4 of s. 8 applies to this case, and clause 3 does not apply. The settlement estate duty on this fund is not payable until after it has come to the hands of the trustees of the settlement, and then it is not a deduction. As soon as the fund is paid to the trustees of the settlement the words "without any deduction" are satisfied, and the trustees must then pay the duty out of the fund.

Austen-Cartmell, in reply. If the argument on behalf of the respondents is correct, *In re Gray* (2) was wrongly decided, since, apart from s. 19 of the Act of 1896, the incidence of estate duty and of settlement estate duty is the same. It is not true to say that the liability to settlement estate duty does not arise until the fund gets into the hands of the trustees; it arises as soon as the fund is raised.

Cur. adv. vult.

(1) [1896] 1 Ch. 914. (2) [1896] 1 Ch. 620.

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March 8. LINDLEY M.R., after referring to the facts as stated in the former report (1), continued:—The sections of the Finance Act, 1894, which are important are ss. 1, 2, 5, 6, sub-s. 2, s. 8, sub-ss. 3 and 4, s. 9, and s. 14, sub-s. 1. The Finance Act, 1896, s. 19, is also important. I do not stop to comment on their exact language. The argument for the appellants, so far as it is based on the Finance Acts, is reducible to the following propositions: (1.) That by the Act of 1894, ss. 5 and 6, sub-s. 2, the settlement estate duty is payable by the executors of the testator. (2.) That the Finance Act does not say by whom the duty so payable is ultimately to be borne in a case like the present, s. 8, sub-s. 4, not applying. (3.) That consequently the duty must be borne by the residuary legatees. The first two of these propositions are correct, but the third is, in my opinion, erroneous, although it was adopted by North J. in *In re Webber*. (2) The executors pay the settlement estate duty as trustees for somebody, but as trustees for whom? Certainly not as trustees for the residuary legatees, who take no interest whatever in the fund in respect of which the settlement estate duty is payable. The executors pay that duty as trustees for those who are beneficially entitled to that fund, and upon plain principles of equity the executors are entitled to be repaid out of that fund what they have by law to pay in respect of it. In my opinion it lies upon the beneficiaries of that fund to shew why this burden which thus falls upon them should be borne by somebody else. The settlement estate duty, although described and imposed as a further estate duty, is imposed, not on the general estate of the deceased, but on specific portions of it, and ought in common fairness to be borne by those who take those portions. To facilitate collection the executors have to pay it, but this I regard as mere machinery. The Legislature has, by s. 19 of the Finance Act, 1896, amended the law as expounded by North J., and has declared that the settlement estate duty payable in respect of property settled by a will is to be borne by the settled property. Kekewich J. treats this enactment as a recognition by the Legislature of the soundness of the reasoning which led to the decision. I

(1) [1899] 2 Ch. 489. (2) [1896] 1 Ch. 914.

cannot so regard the enactment. It corrected a mistake, and so saved further litigation. If the reasoning of North J. is adopted and applied to all settlements of money to be paid on death, we shall have this extraordinary anomaly—that if a settlement is made by will the settlement estate duty is to be borne by the settled property, whereas if the settlement is made by deed that duty is not to be borne by that property at all. This is an utterly irrational conclusion, and is not one at which we are compelled to arrive by the language of the statutes themselves. If there were nothing else in the case the settlement estate duty would, in my opinion, have to be borne by the settled fund.

But then we have to consider the covenant of the testator. He covenanted to pay his daughter's trustees 25,000*l.* "without any deduction." These words are very important. They shew that possible deductions were thought of, and that the settlor clearly intended that his daughter's trustees should be paid 25,000*l.* in full, without any deduction of any sort or kind. It is urged that there is no difference between a covenant to pay 25,000*l.* and a covenant to pay 25,000*l.* without deduction. But the latter form of expression leaves no room for doubt as to the intention of the parties, whilst, if the words "without any deduction" are omitted, the intention is by no means equally clear. The language of the covenant in this case is too plain to be got over. It is agreed on all hands that the daughter's trustees are to receive the 25,000*l.* free from estate duty. But it is urged that the "settlement estate duty," although called a "further estate duty," and made payable by the executors of the covenantor in respect of the settled fund, ought not to be treated as a deduction from it, but rather as a charge on it when paid over. I cannot accede to this argument. It may be conceded that the settlement estate duty is a charge on the settled fund, and that, so far as the Finance Acts are concerned, the executors have to pay it simply for facility of collection. But in the present case we have to consider the trustees of the daughter's settlement on the one hand, and the testator's residuary legatees on the other, and, as between them, his covenant is so plainly worded

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as to preclude any deduction from the 25,000*l.* in favour of the residuary legatees. They are entitled to nothing out of the testator's estate until the 25,000*l.* has been paid "without any deduction," pursuant to his covenant. The executors have to pay the settlement estate duty not simply because the statute requires them to pay it, but also because their testator has thrown the burden of it on his general estate, in exoneration of the 25,000*l.* which was settled on his daughter. Similar observations apply to the trusts of the term of 2000 years created by the testator's will to raise and pay the 25,000*l.* in performance of his covenant—that is, without any deduction as above explained. As between the daughter's trustees on the one side, and the devisees of the estates subject to the term on the other side, the burden of the settlement estate duty falls on the latter and not on the former. In other words, the trustees of the term must, if necessary, raise and pay not only 25,000*l.*, but also the settlement estate duty payable in respect of it. The result, therefore, is that the decision so far as it is appealed from must be reversed, and the duty in question, and the costs of the litigation, must be borne by the testator's general estate.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Evans, Foster & Wadham; Bell, Steward & Co.*

W. L. C.

In re MANCHESTER REAL ICE SKATING AND SUPPLY COMPANY.

C. A. 1900 March 8.

[1899 M. 8132.]

Chancery Court of Lancaster—Practice—Costs—Taxation—Higher and Lower Scales—Matter in question under Amount of 300*l.*—*Orders of November* 27 *and* 28, 1884.

The Order of the Chancery Court of the County Palatine of Lancaster of November 28, 1884, "as to Court Fees and Solicitors' Costs," which prescribes the fees and costs to be allowed "in any case in Court under the amount or value of 300*l.*," applies only to cases under that amount or value to which, but for that order, the lower scale of fees and costs established by the Orders of November 27, 1884, as to Court Fees and Solicitors' Costs would have applied.

APPEAL against an order dated February 5, 1900, of the Vice-Chancellor of the Chancery Court of the County Palatine of Lancaster directing that certain fees and costs should be allowed on the higher scale. Leave to appeal had been given by the Court of Appeal.

On November 14, 1899, the Vice-Chancellor dismissed, with costs to be taxed as between party and party, an originating motion on behalf of M. C. Bannister, asking that the register of members of the above company might be rectified by removing his name therefrom as the holder of 200 shares in the company. The shares were of the nominal value of 1*l.* each.

On the taxation of costs under this order the registrar taxed the costs on the lowest scale provided by the Orders of the Palatine Court. (1) The company objected that the costs

(1) The "Order as to Court Fees" November 27, 1884, provides by rule 7 that "the fees and percentages set forth in the column headed 'Lower Scale,' in the first part of the schedule hereto, are to be taken and paid in the cases mentioned in the second part of the same schedule, and the fees and percentages set forth in the column headed 'Higher Scale,' in the said first part of the said schedule, are to be taken and paid in all other cases."

The second part of the schedule mentions eight classes of cases. The first seven classes comprise cases (none of which includes such a case as the present) in which the matter in question is "under the amount or value of 1000*l.*" The 8th class is, "All proceedings by original special case, originating petition or notice of motion, and all proceedings relating to funds carried to separate accounts, and all proceedings, under any railway or

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ought to have been taxed on the higher scale, and the Vice-Chancellor allowed the objection. He was of opinion that

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private Act of Parliament or under any other statutory or summary jurisdiction, and generally all other cases where the estate or fund to be dealt with shall be under the amount or value of 1000*l.*"

By another Order dated the same day and entitled "Order as to Solicitors' Costs," it is provided (rule 1) that "Solicitors shall be entitled to charge, and be allowed, the fees set forth in the column headed 'Lower Scale' in the schedule hereto, in the following cases," namely, the eight cases mentioned in the second part of the schedule to the "Order as to Court Fees."

By rule 2, "Solicitors shall be entitled to charge, and be allowed, the fees set forth in the column headed 'Higher Scale' in the schedule hereto in all actions for special injunctions to restrain the commission or continuance of waste, nuisances, breaches of covenant, injuries to property, and infringement of rights, easements, patents, and copyrights, and other similar cases where the procuring such injunction is the principal relief sought to be obtained, and in all cases other than those to which the fees in the column headed 'Lower Scale' are hereby made applicable."

Rule 3: "Notwithstanding these rules, the Court or the Vice-Chancellor may in any case direct the fees set forth in either of the said two columns to be allowed to all, or either, or any, of the parties, and as to all, or any part of the costs."

By another "Order as to Court Fees and Solicitors' Costs," dated November 28, 1884, rule 1, "Notwithstanding such of the provisions of the order as to fees and percentages, dated November 27 instant, and those of the order as to solicitors' costs of the same day, as relate to cases in which the several lower scales of fees and costs therein respectively set forth, are thereby made applicable, the fees appointed to be taken by the registrars, or other officers of the Court, and authorized to be charged by and allowed to the solicitors of the Court, upon foot of the several scales headed 'Lower Scale' in the several schedules to such Orders respectively, shall not, until further order, be taken, charged, or allowed in any case in court which shall be under the amount or value of 300*l.*; but in all such cases the fees to be taken and to be charged and allowed as aforesaid respectively, shall be one-half of the fees specified in the several higher scales of the said Orders respectively, except in the instances following, namely: except that this rule is not to apply in any case, so as to increase the amount of any fees authorized to be taken, or to be charged or allowed, on foot of the said lower scales respectively: and is not to apply to any fee authorized to be taken, or to be charged or allowed, for copies, or any ad valorem fee."

Rule 2: "Except in the particulars specified in the last preceding rule, all cases in court under the amount or value of 300*l.* shall, until further order, be regulated by such of the provisions of the said Orders of the Chancery of Lancaster Rules, 1884, as are applicable to cases to which the said several lower scales mentioned in the said Orders are thereby made applicable."

rule 1 of the Order of November 28, 1884, applied only to those cases to which under the Orders of November 27, 1884, the lower scale of costs and fees is applicable, that is, to the cases mentioned in the second part of the schedules to these Orders, and that the effect of rule 1 of the Order of November 28 was only to substitute the scale of fees and costs mentioned in it in those cases coming within the second part of the schedules which were under the amount or value of 300*l.* And the Vice-Chancellor held that at any rate he had a discretion in the matter, and that the case was one in which fees and costs ought to be allowed on the higher scale.

The shareholder appealed.

Warrington, Q.C., and *Austen-Cartmell*, for the appellant. The Order of November 28 governs the present case; it applies in express terms to "any case in court which shall be under the amount or value of 300*l.*" The object was to approximate in small cases to county court costs. The Court has no discretion. *Harrison* v. *Leutner* (1) does not apply, for the rules under the Judicature Act then in force contained no provision as to costs in cases under the amount or value of 300*l.* And the judge had a discretion there.

P. O. Lawrence, Q.C., and *R. B. Lawrence*, for the company. The Order of November 28 introduced an exception from the lower scale established by the Order of November 27, and it applies only to those cases which fall within the lower scale in which the amount or value is under 300*l.* It does not apply to all cases under that amount or value. The introductory words of rule 1 of the Order of November 28 shew that this is the true construction, and the rule has, in fact, always hitherto been so construed.

Warrington, Q.C., in reply.

LINDLEY M.R. I do not think there can be any doubt as to the true construction of the Order of November 28, though the key to its construction is not at first sight easy to find. The Order of November 27 is evidently founded on the Rules of the

(1) (1883) 24 Ch. D. 594.

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Supreme Court under the Judicature Acts. The Order of November 28 only introduces for cases under 1000*l.* in amount or value a modification of the lower scale of costs established by the Order of November 27, and it has no application to any cases to which that lower scale did not apply. The appeal must be dismissed with costs.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

Solicitors: *Pritchard, Englefield & Co., for Simpson, North & Co., Liverpool; Arthur S. Mather, Liverpool.*

W. L. C.

BRITISH MOTOR SYNDICATE, LIMITED *v.* TAYLOR & SON.

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Jan. 16;
Feb. 15.

[1897 B. 4949.]

Patent—Infringement—Patented Articles bought in England and sent Abroad for Sale—"Making use of" the Invention—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *Sched. I., Form D—Measure of Damages.*

The defendants bought in England articles which infringed the plaintiffs' patent, and sent them to their branch business house in Paris, where they were sold to various foreign purchasers:—

Held, that the transport of the articles within the United Kingdom under the circumstances was "making use" of the invention within the meaning of the patent, and constituted an infringement thereof.

The principles as to the assessment of damages discussed in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, (1899) 16 Rep. Pat. Cas. 209, applied.

THE plaintiffs were the registered proprietors of a patent for apparatus for starting gas motor engines, having acquired the patent on February 19, 1897, by assignment from F. W. Lanchester, the original grantee thereof. On November 15, 1897, the plaintiffs brought this action against the defendants for infringement of the patent. By an order made by consent in chambers on April 4, 1898, an injunction and delivery up of infringing articles were ordered against the defendants, and the following inquiry was directed, namely: "An inquiry what damages have been sustained by the plaintiffs by reason of the defendants' infringement of the letters patent."

It appeared from the evidence adduced upon the inquiry that the defendants had bought in England twenty-seven starters which were infringements of the patent. They sold seven of them, and used another in England. It was not disputed that they were liable in respect of those eight starters. The remaining nineteen were sent abroad by the defendants to their branch house in Paris, where they were sold to various foreign firms. The plaintiffs had been unable to recover any damages from the persons who sold the infringing articles to the defendants.

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The plaintiffs claimed to be entitled to 10*l.* for each of the twenty-seven starters on the ground that that was the lowest royalty they had accepted from any wrongful user. The evidence as to this was referred to by his Lordship in his judgment. The defendants contended that they had infringed in respect of the eight starters only, and that the amount of damages ought to be limited to the present trade price of the starters—namely, 3*l.* each.

The master assessed the damages on the basis that the defendants had infringed in respect of all the twenty-seven starters, and that the plaintiffs were entitled to damages to the amount of 8*l.* in respect of each of the infringing articles.

This was a summons by the defendants to vary the master's certificate.

The patent was in the form given in the 1st schedule to the Patents, &c., Act, 1883, Form D. It conferred on the patentee the sole privilege to make, use, exercise and vend the invention within the United Kingdom, and to have and enjoy the whole profit and advantage from time to time accruing by reason of the invention during the term of fourteen years; and commanded all Her Majesty's subjects that they do not at any time during the continuance of the patent "either directly or indirectly make use of or put in practice the invention or any part of the same."

Hume-Williams, *Q.C.*, and *Lainé*, for the defendants. First, as to the nineteen starters sent abroad. What the defendants have done is to buy the articles here, and send them abroad and sell them there. That is not an infringement having regard to the terms of the patent. Possession alone is not infringement except in such a case as *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (1) In *Neilson* v. *Betts* (2) there was a continuing user of the invention. In *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (3) no doubt mere possession was held to be an infringement, and an injunction granted, but on the ground that as the defendants had no intention

(1) (1881) 17 Ch. D. 721. (2) (1871) L. R. 5 H. L. 1.
(3) (1884) 26 Ch. D. 766.

to use the infringing articles an injunction could do them no harm. In *Minter* v. *Williams* (1) exposing for sale was held not to be "vending." With regard to the measure of damages, the master has apparently proceeded upon a dictum in *Penn* v. *Jack*. (2) The plaintiffs can only recover the actual pecuniary loss which they have sustained by reason of the acts of the defendants: *United Horse Shoe and Nail Co.* v. *Stewart*. (3) The loss they have sustained is 3*l*. per article. If the defendants had bought from a licensee of the plaintiffs, that is all the plaintiffs would have got.

[They also referred to *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (4); *Boyd* v. *Tootal Broadhurst Lee Co.* (5); *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.* (6)]

Moulton, Q.C., and *A. J. Walter*, for the plaintiffs. The defendants have infringed the patent by "using" the invention in the United Kingdom. The user consists in purchasing the patented articles and sending them abroad for sale: *United Telephone Co.* v. *Sharples*. (7) The patent covers the whole use and advantage of the invention. The sale of the patented articles in England is a tort in which the purchaser is a wrong-doer as much as the vendor. The purchasing and sending abroad is a wrongful user. The mere possession of goods may be a user of them. *Minter* v. *Williams* (1) was a case on demurrer, and does not conflict with *United Telephone Co.* v. *London and Globe Telephone and Maintenance Co.* (8) In that case there was no sending abroad.

[STIRLING J. No doubt exposing for sale would be a good ground for an injunction.]

Yes. Here we have more. We have the actual sale abroad by the defendants' own agents. In *Nobel's Explosives Co.* v. *Jones, Scott & Co.* (9) it was held that defendants who had done mere clerical work connected with the passing of the goods through the Custom House were not liable to action.

(1) (1835) 4 Ad. & E. 251.
(2) (1867) L. R. 5 Eq. 81.
(3) (1888) 13 App. Cas. 401.
(4) (1882) 8 App. Cas. 5.
(5) (1894) 11 Rep. Pat. Cas. 175.
(6) 16 Rep. Pat. Cas. 209.
(7) (1885) 29 Ch. D. 164; 2 Rep. Pat. Cas. 28.
(8) 26 Ch. D. 766.
(9) 17 Ch. D. 721.

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There was here a beneficial possession in England of the infringing articles which was used by the plaintiffs for profit by sending them abroad for sale. That is an infringement.

Upon the question of damages, it is wrong to say that an infringer ought to be put upon the same terms as a licensee. It is possible to have peace or war with the patentee, but no one can have war with the benefits of peace. A licensee cannot dispute the patent and naturally gets terms from the patentee to which no wrong-doer is entitled. 3*l.* is a minimum royalty. The evidence shews that to users other than manufacturers or licensees the plaintiffs always charged 10*l.* The 3*l.* royalty is a contractual sum which cannot be taken as the basis of damage as against a wrong-doer.

[STIRLING J. referred to *Crossley* v. *Dixon.* (1)]

That was a verbal licence.

[STIRLING J. The real question is, what have you lost? The amount that you exact from an infringer is not the real measure of your damages.]

The defendants have no right to be treated upon the hypothesis that they bought from a licensee. The true measure of damages is what the defendants as traders would have had to pay to the plaintiffs.

Hume-Williams, Q.C., in reply. The plaintiffs can only recover the actual pecuniary loss which they have sustained: *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.* (2) *United Telephone Co.* v. *Sharples* (3) was very different to this case. The question is has the invention been used, not whether the patented article has been used. The mere packing, transporting, and sending abroad is not use of the invention. The plaintiffs' remedy is against the vendors: *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works.* (4)

Cur. adv. vult.

Feb. 15. STIRLING J. (after stating the facts). The question is whether there has been an infringement in respect of the

(1) (1863) 10 H. L. C. 293.
(2) 16 Rep. Pat. Cas. 209.
(3) 29 Ch. D. 164; 2 Rep. Pat. Cas. 28.
(4) [1898] A. C. 200.

nineteen starters. That, as is laid down in *Von Heyden* v. *Neustadt* (1), depends upon the construction of the patent. [His Lordship then read the patent, and continued :—]

The defendants in this case did not make the invention if by that, as seems to be the proper interpretation, is meant manufacturing the patented article.

Passing by, for the moment, the words "use" and "exercise" and the expressions in the preliminary part, did they "vend" it in the United Kingdom?

It appears to be established by the case of *Badische Anilin und Soda Fabrik* v. *Basle Chemical Works* (2) that, in order that a sale may be an infringement, some material part of the transaction of sale must be done in England. I think that is brought out very clearly by the observations of Lord Herschell in advising the House of Lords in that case. In the present case there is no evidence that any part of the transaction of sale took place within the United Kingdom. All that appears to have been done within its limits was to send the infringing articles beyond those limits with a view to a sale there.

There remain, then, to be considered the words "use, exercise," in the granting part of the patent, and the expression "make use of or put in practice" in the prohibitory part. With reference to this, Lord Herschell makes some observations which are of importance. He says (3) : "Supposing that a case of vending could not be established, that no part of the sale was constituted in this country, and that the only charge possible was a charge of using, I do not intend to express my opinion, but I desire distinctly to reserve my opinion whether the mere transport from place to place in this country of a patented article would necessarily be a using in this country." He then goes on to point out that there may be cases, namely, those where the article is, when applied in a particular way, of itself serving the purpose for which it is patented, in which the mere transport of the patented article may amount to a using of it. He then adds that "in a case where the person transporting it or warehousing it gets no advantage out of the

(1) (1880) 14 Ch. D. 230. (2) [1897] 2 Ch. 322; [1898] A. C. 200.
(3) [1898] A. C. 207, 208.

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patent—that is to say, where it can be no more easily, and no more safely, and no more advantageously carried, warehoused, or stored, than if the article were not a patented one, but were an article entirely outside the patent—it by no means follows that the transporting from place to place or otherwise dealing with the patented article in that kind of way would constitute a using." And he said: "I do not desire to decide that point now, but I wish to draw attention to that distinction." It is obvious that Lord Herschell entertained serious doubt as to whether the transporting of the articles was an infringement of the patent. The patented articles, in the present case, when being transported from place to place in this country, were not serving the purpose for which they were patented: and in my opinion the defendants did not, during that transport, "exercise" or "put in practice" the patented invention. What the defendants did was to carry these articles out of the United Kingdom with a view to selling them—that is, with the object of turning them to profitable account. By so doing the defendants attained two objects: First, they prevented the operation of the order contained in the judgment for the delivery up and destruction of the infringing articles; and, secondly, they actually obtained the benefit of the proceeds of sale; and the question is whether that is or is not to "use" the invention, or "directly or indirectly to make use of it." The question is a difficult one, and there is very little authority which bears on it. In *Von Heyden* v. *Neustadt* (1) the patent was for a new process of making a well known chemical product, and James L.J., in delivering the judgment of the Court, said: "A person who makes, or procures to be made, abroad for sale in this country, and sells the product here, is surely indirectly making, using, and putting in practice the patented invention." That is an authority, if authority be wanted, that the prohibitory part of the patent is to be regarded as well as the granting part. Again, in *United Telephone Co.* v. *Sharples* (2), Kay J. said: "It is admitted by the counsel for the defendant that if a man buys abroad, imports into this country, has in his possession here, and sells, although to a

(1) 14 Ch. D. 230, 233. (2) 29 Ch. D. 164, 167.

foreign customer, an instrument which he knows would if made, sold, or used in this country be an infringement of an English patent, that would be an infringement of such patent. I confess I have little hesitation in acceding to this"; and in that case his Lordship held that, on that ground, there had been an infringement. In the report of the same case in 2 Rep. Pat. Cas. p. 31, the words attributed to him are, "that would be a user which would be an infringement of the patent," and I think that must have been the meaning, and that the decision was meant to extend to cases of export for sale where no part of the transaction of sale took place in the United Kingdom. The first meaning assigned to the word "use" in Johnson's Dictionary is "to employ to any purpose"; it is, therefore, a word of wide signification. It seems to me that the terms "use" and "make use of" are intended to have a wider application than "exercise" and "put in practice," and, without saying that no limit is to be placed on the two former expressions in the patent, I think, on the best consideration that I can give, that they are not confined to the use of a patented article for the purpose for which it is patented. In my opinion the transport within the United Kingdom of the articles made according to the plaintiffs' patent under the circumstances which occurred in this case was, indirectly at least, "making use of" those articles within the meaning of the patent, and consequently is an infringement.

The remaining question is as to the amount of damages. The principle on which these are to be assessed was discussed in the recent case of *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.* (1) There the Lord Chief Justice in giving judgment said (2): "I will first consider what is the true principle upon which in such a case the damage is to be assessed. No doubt the defendants are to be treated as wrong-doers. They have done something which they are not entitled to do; but before the plaintiffs are entitled to recover, even as against a wrong-doer, they have to prove damage to themselves. All that can be said in the case of a man who is a wrong-doer is that when the damages come to be considered,

(1) 16 Rep. Pat. Cas. 209. (2) 16 Rep. Pat. Cas. 212.

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juries, and courts where they are performing the functions of juries, deal with them, and commonly and usually deal with them, with a more or less liberal hand; but still the question that must be proposed to a jury or to a judge is,—what is the damage which in such a case as this the plaintiffs have sustained? It seems to me that, applying that principle to the facts of this case, the plaintiffs are entitled to be compensated for the injury that they have suffered by reason of what the defendants have done, and wrongfully done; and in such a case as this, or a case somewhat like this, the damage would be properly divisible under these two heads: What injury has been done to the plaintiffs by reason of their article being shoved out of the market—or, to use the expression, I think, of Lord Watson, 'shouldered out of the market'—to what extent has their trade been injured?—and if the case were one in which the infringing articles were put forward under circumstances in which it might affect the reputation and character of the plaintiffs' business, that would also, in my opinion, be a proper subject to be considered; but in the present case no allegation of damage under that head has been presented or suggested." And in this case also there is no allegation of damage under the second head presented or suggested. Then he observes: "It has been said that the principle ought to be the principle of what the defendants would have had to pay for permission to do the thing which unauthorizedly and wrongfully they did." And after disposing of that in the particular case he goes on to say: "I should like to say in connection with the class of cases that have been so much referred to, that it is quite conceivable that in cases where there is a commercial known standard of licence for the manufacturer of a particular article—and particularly in the case where the patentee is not himself a manufacturer, but makes his profit simply by the granting of licences—the measure of damage may in such cases be the cost of the licence. It may be; but I think, upon an examination of all these cases, it will be found that underlying the measure of damage there is the assumption that, if it had not been that the particular defendant manufactured the particular things,

then that those particular things would have been manufactured by the plaintiff or his licensees." Collins L.J., in giving his judgment in the same case, approves of what was laid down by Wills J., before whom the case came in the first instance, which is this (1): "The plaintiffs have to shew, therefore, that they have sustained pecuniary loss, and, as far as the nature of the case may permit, the amount of that loss." In the present case, the evidence which is adduced in the first instance by the plaintiffs is an affidavit of Mr. Frank Lanchester, who had acted on behalf of the plaintiffs in the manufacture and sale of the patented articles. He says, at paragraph 2: "Previous to the said assignment, which took place on the 19th day of February, 1897, the practice was to grant licences to use and exercise the said invention at a royalty for every starter or starting apparatus made thereunder, and the average royalty so received in respect of patented starters manufactured prior to such assignment amounted to the sum of 6*l.* 6*s.* per starter, without any deduction for cost of manufacture, the licensees in the majority of cases agreeing not to fit a patented starter to an engine of any make other than their own for any less sum than 10*l.* each. Save to such licensees the ordinary price for the said patented starters, inclusive of cost of manufacture was 1*l.* per horse-power of the engine to which they were respectively fitted, with a minimum charge of 10*l.* The cost of manufacture amounted to the sum of 2*l.* or thereabouts. (3.) Since the assignment of the said letters patent to the plaintiffs they have received from the users of the said patented starters a sum varying according to the size of the engine to which they were respectively fitted, but in no case less than 10*l.* per starter."

It is clear, therefore, that the plaintiffs embark on the case seeking to have the damages assessed on the principle that the measure is the sum which the defendants would have to pay for permission to do that which they wrongfully did. The case which is made by Mr. Lanchester's first affidavit was met by the defendants by evidence directed to shew that the plaintiffs granted licences for a less sum than 10*l.* per licence,

(1) 16 Rep. Pat. Cas. 216.

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and that again was met by an affidavit of Mr. Lanchester which seems to be material. He denies the statement which had been made by Mr. Crosta, who gave evidence on behalf of the defendants as to a certain offer of sale. He says: "It is the fact, however, that the plaintiffs were, at that time, in negotiation through me with several large manufacturers to grant, and they have since granted, licences under the said letters patent at a royalty of 3*l.* per starter with a guaranteed minimum yearly number, but no starter has been supplied on such terms to any one other than a manufacturer or engineer being a licensee or intending licensee, and, as mentioned in my former affidavit filed in this action on the 7th June last, to no user has any sum less than 10*l.* per starter been charged." It appears, therefore, from this affidavit of Mr. Lanchester, that the plaintiffs granted licences to manufacturers at a royalty of 3*l.* per article, with a guaranteed minimum yearly number. The effect of so doing would be that the licensees would compete with the plaintiffs as manufacturers and vendors of the patented articles, and this is stated in an affidavit of Mr. Crosta filed on February 20, 1899, at paragraph 12: "The defendants have purchased two of these starters from Forrester at 5*l.* 10*s.* each, and several from Lobb & Co., iron merchants, at 6*l.* 6*s.* each (this includes the middleman's profit)."

This statement is not disputed by the plaintiffs; and in view of these facts it is most improbable that the plaintiffs could succeed in getting 10*l.* for each article from the user of them. The defendants say that the plaintiffs offered these articles at the price of 20*s.* to 30*s.*, according to make, without any royalty. This is distinctly denied by the witnesses on behalf of the plaintiffs, and seems to me unlikely. In paragraph 8 of Mr. Crosta's affidavit he says: "I estimate the loss of profit incurred by plaintiffs by reason of defendants' sale or use of the eight remaining starters at 28*l.* at the outside. They were not sold in competition with plaintiffs', but only attached to gas engines sold or used by the defendants. (9.) I arrive at 28*l.* by multiplying by eight the royalty of 3*l.* asked by plaintiffs on sale of each starter in the ordinary way of business, and an assumed average profit of 10*s.* per starter, part of the price

(either 20*s*., 24*s*., or 30*s*.) usually charged by plaintiffs for manufacture." So that Mr. Crosta, the defendants' own witness, assesses the damage at 3*l*. by way of royalty for each article plus a manufacturers' profit of 10*s*. out of a price varying from 20*s*. to 30*s*. I think that, having regard to the prices actually paid by the defendants, this is too little, and remembering that I am dealing with wrong-doers, and entitled to fix the damages on a liberal scale, I assess the amount for each article at 5*l*. No distinction in this respect was sought to be drawn before me between the articles sold in England and those sold abroad. The damages will therefore be reduced. There will be no costs of the summons.

Solicitors for applicants: *Everett & Hodgkinson.*
Solicitors for respondents: *Norris, Allens & Chapman.*

G. A. S.

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Feb. 27.

BALDWYN *v.* SMITH.

[1899 B. 2987.]

Lunatic—Contract to Purchase Real Estate—Voidable Contract—Completion of Purchase by Committee—Conversion.

A person of unsound mind entered into a contract to purchase real estate; the purchaser was subsequently found by inquisition to be of unsound mind, and a committee of his estate was appointed. The Master in Lunacy directed the committee to complete the purchase, and the purchase-money was provided out of the lunatic's personal estate. The lunatic having died intestate:—

Held, that the direction to the committee to complete the purchase amounted to an election by the Lunacy authorities to adopt the voidable contract entered into by the lunatic, and consequently that a conversion had been effected and the estate descended as realty.

In June, 1890, freehold land and hereditaments at Badsey, in the county of Worcester, were put up for sale by public auction and bid for by one William Baldwyn, who was declared by the auctioneer to be the purchaser at the price of 3677*l.*

At the time of this auction William Baldwyn was of unsound mind.

In May, 1891, William Baldwyn was found by inquisition to be of unsound mind, and one Edward Grantham Righton was appointed committee of his estate. No conveyance of the Badsey estate had at this time been executed or prepared to William Baldwyn or any person on his behalf.

By an order made by the Master in Lunacy in the matter of the said William Baldwyn, and dated August 12, 1892, the contract entered into for the purchase of the Badsey estate was ordered to be carried into effect, and Edward Grantham Righton, as committee of the estate, was ordered to pay the balance of the purchase-money and all interest due thereon out of any money in his hands available.

By another order made by the Master in Lunacy, dated August 7, 1895, the committee was ordered to call in a certain mortgage of 1000*l.* due to William Baldwyn and complete the purchase of the Badsey estate. Pursuant to this order, the

purchase-money and arrears of interest were provided and paid out of the money arising from the said mortgage and other moneys forming part of the personal estate of William Baldwyn.

In November, 1898, William Baldwyn died intestate, and letters of administration were granted to some of his next of kin.

The next of kin commenced the present action against the co-heiresses-at-law of William Baldwyn, claiming a declaration that the Badsey estate, as between the real and personal representatives of the said William Baldwyn, formed part of his personal estate, or, alternatively, a declaration that the Badsey estate devolved as real estate subject to a lien or charge for the unpaid purchase-money, and had descended to the defendants, if at all, subject to the obligation on their part to exonerate the personal estate of the said William Baldwyn to the extent of the amount found for purchase-money and interest from the date of the alleged contract.

The following point of law was eventually set down for hearing under the Rules of the Supreme Court, 1883, Order XXV., r. 2, namely, whether, assuming William Baldwyn to have been of unsound mind at the date of the contract, a conversion of the personal estate of the lunatic was effected by virtue of the said orders of August 12, 1892, and August 7, 1895, so as to bind the next of kin. This point of law now came on for argument.

Rowden, Q.C., and *Buckmaster*, for the plaintiffs. There has been no conversion. It is not the practice of the authorities in Lunacy to effect a conversion of the lunatic's personal property into realty, or his real estate into personalty, or to do anything to alter the devolution of his property: *Attorney-General* v. *Marquis of Ailesbury* (1), where the practice of the Court on this point is fully stated. The lunatic himself was not capable of entering into a contract; there cannot be a contract by a lunatic: *In re Rhodes* (2); the contract was to all intents and purposes void, and could not, therefore, effect any conversion. There is nothing in the orders of August, 1892, and August,

(1) (1887) 12 App. Cas. 672. (2) (1890) 44 Ch. D. 94, 105.

BYRNE J. 1895, which declare or shew any intention to convert or change the nature of this estate: it was simply a means of investing part of the personal estate.

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Levett, *Q.C.*, and *T. B. Napier*, for the defendants. Once get a contract, and conversion follows as a matter of course: *Lawes* v. *Bennett*. (1) As soon as the authorities in Lunacy took upon themselves not to avoid, but to adopt, this contract, it became binding with the usual consequences, and has effected a conversion in the ordinary way.

[*Jones* v. *Green* (2) and *In re Freer* (3) were also referred to.]

Rowden, *Q.C.*, in reply. Confirmation of a contract by the Lunacy authorities has not the same effect as confirmation by the lunatic on recovering his senses. What was done was done in due course of management of the lunatic's estate; an investment of this kind is never intended to alter the devolution of the estate. There appears to be no direct authority on this point.

BYRNE J. This case raises a curious point, not free from difficulty, and upon which there does not seem to be any direct authority. A man, while of unsound mind, entered into a contract to purchase an estate. The contract was accordingly voidable. Afterwards he was found a lunatic, and under the Lunacy jurisdiction the committee was ordered to carry out the contract and to pay, out of personal estate belonging to the lunatic, the purchase-money for the real estate. I take that to be the exercise by the Court of a power which the lunatic himself would have had if he had become of sound mind. The Court in Lunacy could have declined to direct this purchase to be carried out, or could have directed proceedings to be taken for the cancellation of the contract; but acting, as the Court always does, with the sole view of what is for the benefit of the lunatic, it directed that contract to be carried out. I read that as being a confirmation of, or rather, perhaps, I should say, an election not to reject, the voidable contract, but to treat it as having been valid from its original date. It is entirely different

(1) (1785) 1 Cox, 167; 1 R. R. 10. (2) (1868) L. R. 5 Eq. 555.
(3) (1882) 22 Ch. D. 622.

when the question is whether real estate should be purchased for the benefit of the lunatic after the date of the lunacy, or whether real estate should be sold as being for the benefit of the lunatic, and as to that there is no doubt about the law at all; but it does appear to me that the confirmation of a contract, under circumstances like the present, means confirmation of the contract as from the date of its being entered into, with the necessary legal consequences ensuing from it. The result of that is that I think the plaintiffs' contention fails; and I dismiss the action with costs.

Solicitors: *Crowders, Vizard & Oldham, for Smith & Smith, Evesham; Smiles & Co., for E. S. Wood, Winchcomb.*

W. C. D.

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1900

Feb. 27; *March* 9.

GARDNER *v.* HODGSON'S KINGSTON BREWERIES COMPANY.

[1899 G. 1599.]

Prescription Act, 1832 (2 & 3 *Will.* 4, *c.* 71), *s.* 2—*Easement—Way—"Claiming Right thereto"—Evidence.*

From the fact that a way to a messuage had been enjoyed for more than sixty years, and a small annual payment was made for at least the last forty-four years for it, the judge inferred that the way was enjoyed under a parol licence given more than forty years ago in consideration of an annual payment:—

Held, that the owner of the messuage was for the full period "claiming right" to the way within the meaning of s. 2 of the Prescription Act; and that, in the absence of proof of enjoyment by consent or agreement in writing, an absolute right to the use of the way had been acquired.

THE plaintiff, as trustee under a will, was the freeholder of a messuage and premises, No. 203, High Street, Sutton. The only access for horses and carts to the back part of her premises, which had for many years been used for the business of livery stables and till recently for a knacker's yard, was through the yard of an inn called the Red Lion in High Street, Sutton, which belonged to the defendants.

The plaintiff claimed a declaration that she was entitled to a right of way from her back yard to a pump in the yard of the Red Lion, and a right to take water from the pump, and a right of way for horses and carts through the Red Lion yard to and from High Street, and an injunction to restrain the defendants from interfering with her exercise of the rights claimed.

At the trial the defendants did not contest the plaintiff's claim to access to and the use of the pump. But they contested the right of way for carriages and horses to the livery stables. The facts proved to the judge were that for upwards of sixty years the use of the way of the yard for horses and carriages had been openly and regularly enjoyed without interruption by the occupier of the livery stables, and that the owner of No. 203, High Street had, at least from 1855, paid a yearly sum of

15*s.* to the owner of the Red Lion for the use of the way. There was no evidence of the origin of the payment of 15*s.* a year, and no evidence of any consent or agreement in writing to allow the use of the way.

Micklem, Q.C., and *E. S. Ford*, for the plaintiff. If the payment of 15*s.* a year is to be imputed to contribution to repair of the roadway, there can be no question that she has by prescription the right of way claimed.

Assuming against her that the 15*s.* was a payment by way of quasi rent, we admit that a title by prescription could not be acquired by enjoyment for twenty years only. But under s. 2 of the Prescription Act (1) the section that relates to ways, where there has been user of a way by a person claiming right thereto for more than forty years, no matter what the right was, unless it is shewn that the way was enjoyed by consent or agreement by deed or writing, the owner of the dominant tenement has an absolute and indefeasible right to the use of the way. Sect. 5, which relates to pleading, is couched in rather different language: the phrase corresponding to claiming right is "as of right," that manifestly means the same thing and confirms the construction we put on s. 2.

Whatever doubt may be raised by the language in earlier

(1) Sect. 2 of the Prescription Act, 1832, is as follows: "And be it further enacted, that no claim which may be lawfully made at the Common Law, by custom, prescription, or grant, to any way or other easement, or to any watercourse, or the use of any water, to be enjoyed or derived upon, over, or from any land or water of our said Lord the King, his heirs or successors, or being parcel of the Duchy of Lancaster or of the Duchy of Cornwall, or being the property of any ecclesiastical or lay person, or body corporate, when such way or other matter as herein last before mentioned shall have been actually enjoyed by any person claiming right thereto without interruption for the full period of twenty years, shall be defeated or destroyed by shewing only that such way or other matter was first enjoyed at any time prior to such period of twenty years, but nevertheless such claim may be defeated in any other way by which the same is now liable to be defeated; and where such way or other matter as herein last before mentioned shall have been so enjoyed as aforesaid for the full period of forty years, the right thereto shall be deemed absolute and indefeasible, unless it shall appear that the same was enjoyed by some consent or agreement expressly given or made for that purpose by deed or writing."

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decisions, it is now settled that the person prescribing need not be claiming an absolute right against the owner in fee: *Dalton* v. *Angus* (1); *Plasterers' Co.* v. *Parish Clerks' Co.* (2); *Tickle* v. *Brown* (3); *Kinloch* v. *Nevile* (4); *Bewley* v. *Atkinson* (5); *Warburton* v. *Parke.* (6)

We rely on the Prescription Act, s. 2. Apart from that, however, there is evidence from which it might and would be inferred that there was a lost grant in perpetuity subject to the rent of 15*s.* a year.

Hon. E. C. Macnaghten, Q.C., and *George Cave*, for the defendants. The plaintiff and her predecessors were not claiming right or as of right within the meaning of the Prescription Act. The payment of rent is evidence of a fresh licence given every year which can be revoked: *Bright* v. *Walker* (7); *Tickle* v. *Brown* (3); *Monmouthshire Canal Co.* v. *Harford* (8); *Beasley* v. *Clarke* (9); *Tone* v. *Preston* (10); *Chamber Colliery Co.* v. *Hopwood.* (11)

Micklem, Q.C., in reply.

March 9. COZENS-HARDY J. (after stating the facts). Upon these facts I think the inference I ought to draw is that a licence or permission to use this way across the yard was given by parol more than forty years before action brought, and that such licence was not gratuitous, but was subject to the payment of 15*s.* a year. I do not find that there was any fresh application for permission during the currency of the forty years, or anything to suggest a change in the original arrangement when first the licence by parol was granted. Under these circumstances it is asserted by the plaintiff and denied by the defendants that a right has been acquired under s. 2 of the Prescription Act. It is necessary to consider care-

(1) (1881) 6 App. Cas. 740, 800.
(2) (1851) 6 Ex. 630.
(3) (1836) 4 Ad. & E. 369; 43 R. R. 358.
(4) (1840) 6 M. & W. 795.
(5) (1879) 13 Ch. D. 283.
(6) (1857) 2 H. & N. 64.
(7) (1834) 1 C. M. & R. 211; 40 R. R. 536.
(8) (1834) 1 C. M. & R. 614; 40 R. R. 648.
(9) (1836) 2 Bing. N. C. 705; 42 R. R. 704.
(10) (1883) 24 Ch. D. 739.
(11) (1886) 32 Ch. D. 549.

fully the language of the Prescription Act, and it will be convenient first to attempt to construe it without reference to the authorities. [His Lordship, after reading s. 2 of the Prescription Act, 1832, continued:—] The effect of this section seems to be this. There must be actual enjoyment for twenty years or forty years "without interruption," which is defined in s. 4. It is not necessary that "any person claiming right thereto" should during the whole period have claimed to be legally entitled against the owner of the servient tenement. An easement within s. 2, which has been actually enjoyed without interruption during the prescribed period without any shred or tittle of justification is rendered valid; there is, however, a difference between uninterrupted enjoyment for twenty years and for forty years. The former is only primâ facie evidence of the title of the owner of the dominant tenement, and his title may be defeated in any other way by which in 1832 it was liable to be defeated. Proof of a consent or agreement, whether by parol or in writing, will suffice to defeat the title. But uninterrupted enjoyment for forty years is absolute and conclusive evidence of title, with one exception only—namely, if the owner of the servient tenement can establish that the enjoyment was "by some consent or agreement expressly given or made for that purpose by deed or writing." A parol agreement will not suffice. Sect. 5 deals with pleadings. [His Lordship read that section, and continued:—]

I do not think this section is really material for the present case. It is not the section which confers the right. It only states the mode in which under the then state of the law the statutory right had to be pleaded in actions at law. But it seems to me that even if, under s. 5, "enjoyment thereof as of right" for forty years must be alleged, those words should be read with reference to s. 2, which treats enjoyment after forty years as being of right, unless it is shewn to be due to some written consent or agreement.

In the present case there has been actual uninterrupted enjoyment for more than forty years under a parol licence, and, according to the construction, which, apart from authorities, I should adopt, that establishes the plaintiff's right to the

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easement. It remains to consider whether this view is consistent with the authorities by which I am bound.

In *Bright* v. *Walker* (1) Parke B. says: "In order to establish a right of way, and to bring the case within this section, it must be proved that the claimant has enjoyed it for the full period of twenty years, and that he has done so 'as of right,' for that is the form in which by s. 5 such a claim must be pleaded; and the like evidence would have been required before the statute to prove a claim by prescription or non-existing *grant*. Therefore, if the way shall appear to have been enjoyed by the claimant, not openly and in the manner that a person rightfully entitled would have used it, but by stealth as a trespasser would have done—if he shall have occasionally asked the permission of the occupier of the land—no title would be acquired, because it was not enjoyed 'as of right.'"

In *Monmouthshire Canal Co.* v. *Harford* (2) Parke B. says: "The issue is, whether the occupiers of the closes, *of right* and *without interruption*, have had the use and enjoyment for twenty years, as they insist; under this issue, therefore, they must shew an uninterrupted rightful enjoyment for twenty years."

These two cases may to some extent have turned upon points of pleading, but they certainly put a somewhat narrow construction upon the Act. If, however, they mean that the Act only applies where during the whole of the prescribed period the enjoyment was, apart from the Act, rightful, they cannot now be regarded as good law.

In *Wright* v. *Williams* (3), to which Parke B. was a party, it was expressly decided (4) that the statute "intended to confer, after the periods of enjoyment therein mentioned, a right from their first commencement, and to legalize every act done in the exercise of the right during their continuance."

This seems to me to introduce a very important explanation of the true meaning and effect of the statute. It shews that "as of right" in s. 5 cannot mean rightful apart from the Act.

(1) 1 C. M. & R. 219; 40 R. R. 536.
(2) 1 C. M. & R. 614, 631; 40 R. R. 648, 663.
(3) (1836) 1 M. & W. 77.
(4) 1 M. & W. 99.

Tickle v. *Brown* (1) is an important authority, and one upon which both the plaintiff and the defendants rely.

It was an action of trespass in which the plaintiffs in substance complained of an interference with an alleged right of way over the defendant's land which was pleaded as having been enjoyed for forty years as of right and without interruption. At the trial primâ facie evidence of the enjoyment of the way for forty years was given. The defendant proved that the way had not been used about the year 1800 for three or four years during which the land was under tillage, and the defendant proposed to ask a witness whether a penny a year had not been paid in 1798 (i.e., within the forty years) by the occupiers of the land in right of which the way was claimed for the use of the way. Plaintiff's counsel objected, and Lord Denman C.J. rejected the evidence, and a rule was obtained for a new trial. In delivering the judgment of the Court, Lord Denman used the following words with reference to s. 5 (2): "The greatest difficulty arises from the language of the concluding paragraph of this section, and more particularly from the words 'or any cause or matter of fact or of law not inconsistent with the simple fact of enjoyment.' As all these matters are required to be specially pleaded, and forbidden to be given in evidence under a general traverse of the enjoyment as of right, it is plain that they are treated by the Legislature as consistent with such an enjoyment; and as, by the rules of pleading and of logical reasoning, every allegation by way of answer, which does not deny the matter to which it is proposed as an answer, is taken to confess it, we must conclude that the Legislature used the words 'as of right' in such a sense, as that a party confessing the enjoyment '*as of right*' for forty years or twenty, as the case may be, may account for and avoid the effect of it by alleging in the one case a consent or agreement, provided it be by deed or writing (see s. 2), and in the other any contract, &c., written or parol (see s. 5). It follows that the words *as of right* cannot be confined to an adverse right from all time as far as evidence shews; for, if they were so confined, such enjoyment, once confessed, could not be avoided by replying that it

(1) 4 Ad. & E. 369; 43 R. R. 358. (2) 4 Ad. & E. 381.

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was held by contract, which is not adverse. Again, as the legal right to a way cannot pass except by deed, it is plain that the words 'enjoyment as of right' cannot be confined to enjoyment under a strict legal right; for then a 'consent or agreement' in 'writing' *not under seal*, of which the 2nd section speaks, could not account for such enjoyment. The words, therefore, must have a wider sense; and yet they must have the same sense as the words 'claiming right thereto' in the 2nd section, otherwise there will be incongruities in the construction of the Act. It seems, therefore, that the 'enjoyment as of right' must mean an enjoyment had, not secretly or by stealth, or by tacit sufferance, or by permission asked from time to time, on each occasion or even on many occasions of using it; but an enjoyment had openly, notoriously, without particular leave at the time, by a person claiming to use without danger of being treated as a trespasser, as a matter of right, whether strictly legal by prescription and adverse user or by deed conferring the right, or, though not strictly legal, yet lawful to the extent of excusing a trespass, as by a consent or agreement in writing not under seal, in case of a plea for forty years, or by such writing or parol consent or agreement, contract or licence, in case of a plea for twenty years. According to this view of the Act, a licence in writing must be replied to a plea of forty years' enjoyment, if it cover the whole time, and the same for a parol licence in case of a plea for twenty years. But it was argued by the Attorney-General, that each leave given, in case of permission repeatedly asked, is as much a consent or agreement pro hâc vice as a consent or agreement for twenty years, and therefore, according to this view of the Act, ought to be replied, which is contrary to the decision of *Monmouthshire Canal Co.* v. *Harford.* (1) On looking at the report of that case we find that the decision rests on this ground, viz., that the asking leave from time to time *within* the forty or twenty years, breaks the continuity of the enjoyment as of right, because each asking of leave is an admission that, at that time, the asker had no right; and, therefore, the evidence of such asking *within* the period is admissible under a general traverse

(1) 1 C. M. & R. 614; 40 R. R. 648.

of the enjoyment of forty or twenty years as of right. To this ground of decision we quite accede; and it will follow that, not only an asking leave, but an agreement *commencing within the period*, may be given in evidence under the general traverse, notwithstanding the words of the 5th section; for the party cannot and does not rely on it as an answer to an enjoyment as of right which he confesses, nor as avoiding any such enjoyment during the time covered by the agreement; but as shewing that there was not, at the time when the agreement was made, an enjoyment as of right; and so the continuity is broken, which is inconsistent with the simple fact of enjoyment during the forty or twenty years."

It will be observed that in *Tickle* v. *Brown* (1) the Court of Queen's Bench put a more liberal construction upon the Act than had been adopted by the Court of Exchequer; and, further, that the only point really decided was that evidence of an application for leave in 1798—within the forty years—was admissible evidence to negative the enjoyment for forty years. But I confess that I am not able to follow all the dicta of Lord Denman. In particular, I cannot understand why enjoyment "by tacit sufferance" for the prescribed period should not confer a right.

In *Beasley* v. *Clarke* (2) user for twenty years was pleaded, and also user for forty years. The Court of Common Pleas held that evidence that a former occupier of the alleged dominant tenement had within the twenty years applied for and obtained leave to use the way, was admissible to shew that the way had not been used as of right during the twenty years, and also during the forty years. This was consistent with *Tickle* v. *Brown* (1), but did not go any further.

In *Kinloch* v. *Nevile* (3) Alderson B. says: "If a parol permission extends over the whole of the twenty years, the party enjoys the way as of right and without interruption for the twenty years; not so, if the leave given be from time to time within the twenty years." This dictum is consistent with *Tickle* v. *Brown* (1), and covers a point which was not decided

(1) 4 Ad. & E. 369; 43 R. R. 358. (2) 2 Bing. N. C. 705; 42 R. R. 704.
(3) 6 M. & W. 806.

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in *Tickle* v. *Brown* (1)—namely, the effect of permission applied for and granted not within but before the prescribed period.

In *Plasterers' Co.* v. *Parish Clerks' Co.* (2) it was held that payment of a yearly rent for light was not an interruption so as to prevent the acquisition of a right by actual enjoyment for more than twenty years under s. 3; and in *Bewley* v. *Atkinson* (3), which was also under s. 3, the Court of Appeal treated payment of 6*d.* a year from 1814 to 1859 as a clear recognition of the continued existence of an agreement made in 1814, under which the enjoyment had been originally had; and Baggallay L.J. added (4): "If that agreement was only a parol agreement it carries the case no further."

These last two cases turned upon s. 3, which differs somewhat from s. 2; but I think they are useful guides in interpreting s. 2.

In *Warburton* v. *Parke* (5) Bramwell B., who delivered the considered judgment of the Court of Exchequer, pointed out that the proviso at the end of s. 1, which is identical with the proviso at the end of s. 2, "supposes there may be an enjoyment as of right though by consent or agreement."

This seems tersely to affirm the view which I have expressed.

Lastly, in the well-known case of *Dalton* v. *Angus* (6) Lord Selborne says: "It is undoubtedly true that under the 2nd section there is an important difference between a forty years' and a twenty years' user. Forty years' user has the same effect which (under the 3rd section) twenty years' user has as to light; it makes the right absolute and indefeasible, unless it is shewn to have been enjoyed by consent or agreement in writing."

The above authorities seem to me to lay down that actual uninterrupted enjoyment of a way for forty years suffices to establish the easement; unless it can be shewn to have been enjoyed under some written consent or agreement. And, further, that a parol licence is of no moment, unless it was applied for and granted within the period of forty years, in

(1) 4 Ad. & E. 369; 43 R. R. 358.
(2) 6 Ex. 630.
(3) 13 Ch. D. 283.
(4) 13 Ch. D. 295.
(5) 2 H. & N. 70.
(6) 6 App. Cas. 800.

which case it may probably be used to negative the enjoyment of the easement for forty years. This principle must, in my judgment, apply whether the parol licence is gratuitous or for a consideration. The continued payment of an annual sum is attributable, as in *Bewley* v. *Atkinson* (1), to the original parol agreement or licence given more than forty years ago, and is not evidence of a fresh application each year for a fresh licence.

Although I prefer to base my judgment on the Prescription Act, I wish to add that I think this is a case in which, if necessary, a lost grant ought to be presumed of the right to the pump and of the right of way through the yard, and any requisite amendment to the pleadings ought to be allowed. Such a grant might be subject to payment of 15*s.* a year. This nominal payment is of no real importance to either party. The only substantial question is as to the existence of this right of way, which is vital to the enjoyment of the plaintiff's property. The result is that, in my opinion, the plaintiff is entitled to the relief claimed, and I must make the declaration and grant the injunction asked. The defendants must pay the costs of the action.

Solicitors: *Spencer, Gibson & Co.; Lovell & Broad.*

(1) 13 Ch. D. 283.

D. P.

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Feb. 15, 16, 24.

In re MAUDSLAY, SONS & FIELD. MAUDSLAY *v.* MAUDSLAY, SONS & FIELD.

[1899 M. 2961.]

Receiver—Debenture-holders—Charge on Property in Foreign Country—French Debt—Locality of Debt—Unsecured Creditor—Enforcing Payment—Interference with Receiver—Contempt.

In October, 1899, receivers were appointed in debenture-holders' actions of the undertaking and of the property whatsoever and wheresoever both present and future of an English company, the order following the wording of the debentures. Among the assets of the company was a debt due to them from a French firm. In November, 1899, P. & Co., English creditors of the company, took proceedings in France for the purpose of attaching the debt due to the company from the French firm. The plaintiffs in the debenture-holders' actions moved to restrain P. & Co. from intercepting, attaching, or taking in execution, or attempting to obtain payment of moneys due to the company from the French firm, or from otherwise interfering with the receivers:—

Held, on the authority of *Liverpool Marine Credit Co.* v. *Hunter*, (1867) L. R. 4 Eq. 62; (1868) L. R. 3 Ch. 479, that the existence of the charge created by the debenture, though valid according to English law, did not entitle the debenture-holders to prevent P. & Co., who were unsecured creditors, from asserting and enforcing any rights given them by French law against this French debt, there being no equity in favour of the debenture-holders as against P. & Co., that the debt due from the French firm must be treated as being situate in France, and subject to French law, and P. & Co. could not be prevented, at the suit of the debenture-holders, from taking any proceedings the law of France allowed for recovering their debt out of this French asset, and that the attachment, which alone was recognised by the law of France, ought to prevail over the title of the debenture-holders:

Held, further, that the appointment of the receivers made no difference; for though the Court can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the Court; something else has to be done, and until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt either on the ground of interfering with the receivers' possession or otherwise, and for this purpose no distinction can be drawn between a foreigner and a British subject.

MOTION.

The question raised by this application was as to the right of an English creditor of an English company to take proceedings in a foreign country to attach a foreign debt owing to the

English company, notwithstanding the fact that the foreign debt was included in the debentures of the English company, and in an order appointing a receiver of the property comprised in these debentures.

The facts, so far as material, and as stated by the judge, were as follows:—

In October, 1899, receivers were appointed, in three actions by debenture-holders, of the undertaking and of the property whatsoever, wheresoever both present and future of the defendant company, Maudslay, Sons & Field, Limited, the order following the wording of the debentures. The company was not wound up. Among the assets of the defendant company were moneys due to them from a French firm, Delaunay, Belleville & Cie., under a contract for the supply of the Belleville boilers to the Admiralty by the defendant company.

The English firm of Thomas Piggott & Co., Limited, were the holders of a dishonoured acceptance of the defendant company, and in November, 1899, Thomas Piggott & Co. registered in Paris this dishonoured bill of exchange, and served on Delaunay, Belleville & Cie. certain documents, the effect of which was fully explained in an affidavit by two French advocates, which all parties had agreed to accept as a correct statement of French law on this point, and also as to the effect of the usual form of debentures on a French debt, and the position in France of a receiver in a debenture-holders' action. The material parts were as follows:—

"4. According to French law a debt can be assigned or charged, but in order to be operative as against third parties (which denomination includes the creditors' own creditors) it is imperative (1.) that the assignment or charge should be by instrument in writing; (2.) that the 'ad valorem' registration duty should have been paid thereon; and (3.) that formal notice in writing of the assignment or charge should after such registration be served upon the debtor by an officer of the French court, called or named a 'huissier.' This formal notice can be replaced by the debtor's formal acknowledgment of the assignment or charge in a notarial French deed; when these requirements have been complied with and not before, the

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transferee acquires a legal title to the debt as against third parties, as from the date of the formal notice. An assignment or charge of a debt not perfected by registration and subsequent notice to the debtor, passes no title whatever to the debt, as against third parties, including the assignors' own creditors.

"5. We are informed that the above-named plaintiffs claim to hold debentures or debenture stock issued by the defendant company in a form purporting to charge all the property of the defendant company whatsoever and wheresoever present and future, which by English law comprises the money payable, or to become payable, to the defendant company by Messrs. Delaunay, Belleville & Cie. under their agreement with the defendant company. We say that in the absence of registration and notice as aforesaid any debentures or debenture stock have not, according to French law, passed to the holders thereof the moneys payable or to become payable to the defendant company from Messrs. Delaunay, Belleville & Cie. under the agreement, or given to them any charge upon or interest in the same as against third parties as aforesaid. We are further informed that receivers or sequestrators of all the property comprised in the said debentures or debenture stock have been appointed by this Court on behalf of the said debenture or debenture stock holders. We say that according to French law the said receivers or sequestrators as such have no right whatever to receive the above-mentioned moneys, and could not recover the same, and would receive no recognition whatever, in the French court as against attaching creditors.

"6. According to French law any creditor, whether French or foreign, who seeks to enforce his claim on a debt owing in France can only do so in accordance with French law, irrespective of the cause of action and of the place where it arose.

"7. According to French law any creditor whether French or foreign can, if he holds an acknowledgment of debt signed by his debtor, such as a bill or acceptance, attach in the hands of a third party the sums or bills which may belong to his debtor, and thus prevent the same from being handed over to him. No judge's authority is required, nor is it necessary

that the creditor, if foreign, should be entitled to follow the same course in his own country, French law disregarding entirely foreign laws in matters of procedure which are exclusively governed by the 'lex fori.'

"8. We have perused the document now produced to us and marked 'B,' which is a copy certified by the process server of the proceedings taken at the request of Thomas Piggott & Co., Limited. These proceedings comprise the attachment ('opposition'), notice of attachment ('dénonciation d'opposition'), and counter notice of attachment ('contre-dénonciation d'opposition'), and have been taken in accordance with French law and constitute an attachment in due form upon which Messrs. Thomas Piggott & Co., Limited, are entitled to rely to force their claim against the moneys payable or to become payable to the defendant company by Messrs. Delaunay, Belleville & Cie.

"9. The notice of attachment contains a citation for the defendant company to appear before the Tribunal Civil of the Seine who has alone jurisdiction to declare the attachment valid and order the funds attached to be paid over to the attaching creditors.

"10. According to French law when the judgment declaring an attachment valid has become final it operates as an assignment of the funds attached to the attaching creditor, who is entitled to recover the same from the party owing the same, notwithstanding any subsequent attachments.

"11. As long as the judgment declaring the attachment valid has not become final any other creditor could follow the same course as the one followed by Messrs. Thomas Piggott & Co., Limited, if they have an acknowledgment of debt as aforesaid, and in this case all attachments would rank pari passu, the date of the respective attachments giving no cause of preference. When several attachments are notified it is often the practice of the person receiving the attachments to pay the funds he holds into the Caisse des Dépôts et Consignations subject to the attachments, so as to assure a legal distribution of the same."

The plaintiffs, in the debenture-holders' actions, moved before North J. to restrain Thomas Piggott & Co., Limited, from

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intercepting, attaching or taking in execution or otherwise attempting to obtain payment of monies due to the company from Delaunay, Belleville, & Cie., or from otherwise interfering with the receivers; and for an order requiring Thomas Piggott & Co., Limited, to revoke or withdraw the notice served upon Delaunay, Belleville & Cie. By an order made by North J. on December 21, 1899, on the hearing of the motion, Thomas Piggott & Co., Limited, by their counsel undertaking, upon payment into Court by the receivers of the sum of 530*l.*, to withdraw their proceedings in France, and the plaintiffs by their counsel undertaking to abide by any order the Court might make as to the costs of Thomas Piggott & Co., Limited, of the said proceedings in France beyond the said sum of 530*l.*, should it be insufficient to pay these costs after satisfying the claim of Thomas Piggott & Co., Limited, the Court ordered the receivers to pay into Court 530*l.* to answer the claim of Thomas Piggott & Co., Limited, and the costs of the proceedings in France; and it was ordered that Thomas Piggott & Co., Limited, should have the same right, against the 530*l.*, to recover their debt and the costs of the proceedings in France, as they would have against any sums payable by Delaunay, Belleville & Cie. to the defendant company, and the rest of the motion was ordered to stand over. The motion now came on for argument on the question whether Thomas Piggott & Co., Limited, were or were not entitled to payment out of the fund in Court, it being also arranged that, if necessary, Thomas Piggott & Co., Limited, should be treated as applying for liberty to proceed, notwithstanding the appointment of receivers.

Vernon Smith, Q.C., and *Romer*, for the plaintiffs. This French debt is included in the debentures, and under the terms of the debenture we have a charge on this foreign debt; the existence of this charge is sufficient to prevent any unsecured creditor from enforcing his claim to the prejudice of the debenture-holders; to attempt to do so after the appointment of a receiver is an interference with the receiver amounting to contempt. Though it may be necessary for the

receiver to take some further steps in France to perfect the security, still, he has an equitable charge already, and the equity is in favour of the debenture-holders as against an unsecured creditor. The locality of the debt is that of the creditor: *Sill* v. *Worswick* (1); Story on Conflict of Laws, 8th ed. p. 559. A chose in action has no locality: *Lee* v. *Abdy*. (2) The assignment of this chose in action to the debenture-holders is valid: *In re Queensland Mercantile and Agency Co.* (3); *Alcock* v. *Smith*. (4) We have a good charge on this chose in action in this country, and are entitled to prevent any one else in this country from interfering with our charge. *Liverpool Marine Credit Co.* v. *Hunter* (5) is distinguishable, and does not apply. The receivers were appointed over all the property comprised in the debentures, including this French debt, and it is a contempt of Court to try and intercept any property which ought to come to the hands of the receivers.

[*Mercantile Investment and General Trust Co.* v. *River Plate Trust, Loan, and Agency Co.* (6) and *In re Alabama, New Orleans, Texas, and Pacific Junction Ry. Co.* (7) were also referred to.]

As to this being treated as an application for leave to prosecute proceedings in France notwithstanding the appointment of the receivers, this is not the kind of case in which leave so to do should be given.

Theobald, Q.C., and *Dunham*, for Thomas Piggott & Co., Limited. Though a debt has no absolute local existence, still it has a quasi locality: *Commissioner of Stamps* v. *Hope*. (8) The appointment of a receiver of all the assets of a company in general terms, as was done in this case, does not appoint him receiver of assets out of the jurisdiction of the Court. A receiver of foreign assets is only made on special application and information. Looking at all the circumstances of this case, nothing has been done by us which amounts to contempt, but if there

(1) (1791) 1 H. Bl. 665; 2 R. R. 816.
(2) (1886) 17 Q. B. D. 309.
(3) [1891] 1 Ch. 536; [1892] 1 Ch. 219.
(4) [1892] 1 Ch. 238.
(5) L. R. 4 Eq. 62; 3 Ch. 479.
(6) [1892] 2 Ch. 303.
(7) [1891] 1 Ch. 213.
(8) [1891] A. C. 476.

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has been a technical contempt we ought to have leave, notwithstanding the appointment of receivers, to go on with the proceedings in France: *Lane* v. *Capsey*. (1) The French law is the law applicable for the recovery of this debt, and there is no equity which ought to prevent us from enforcing our remedies there; the debt having a quasi local situation the lex fori must apply: *Cook* v. *Gregson* (2); *Pardo* v. *Bingham* (3); *In re Klœbe* (4); *In re Doetsch*. (5) The cases relied on by the plaintiffs, such as *In re Queensland Mercantile and Agency Co*. (6), and *Alcock* v. *Smith* (7), so far as they are in point, are in our favour. *Lee* v. *Abdy* (8) is distinguishable: there was no question in that case of conflict of law, and it only decided that an assignment of a chose in action is governed by the lex loci. *Liverpool Marine Credit Co*. v. *Hunter* (9) is directly in point and in our favour.

Vernon Smith, Q.C., in reply. The order appointing the receivers follows the words of the debenture, and if the debenture included this debt, as we say it did, the order includes it too, and is not limited to assets within the jurisdiction. Though this Court may not be able to recover the French debt, and proceedings in France by the receivers may be necessary for this purpose, still the interference by this creditor is a contempt: *Langford* v. *Langford*. (10) The Court acts in personam in these cases for the purpose of enforcing its orders; Piggott & Co. are domiciled in England, therefore the Court can and ought to restrain them from preventing the receivers from getting in this French asset.

Cur. adv. vult.

Feb. 24. COZENS-HARDY J., after stating the facts and reading the affidavit of the French advocates as set out above, continued:—I must decide this case on the footing that the parties now occupy the same position as they did on December 21. At that date Thomas Piggott & Co., Limited, whom I

(1) [1891] 3 Ch. 411.
(2) (1854) 2 Drew. 286.
(3) (1868) L. R. 6 Eq. 485.
(4) (1884) 28 Ch. D. 175.
(5) [1896] 2 Ch. 836.
(6) [1891] 1 Ch. 536; [1892] 1 Ch. 219.
(7) [1892] 1 Ch. 238.
(8) 17 Q. B. D. 309.
(9) L. R. 4 Eq. 62; 3 Ch. 479.
(10) (1835) 5 L. J. (Ch.) (N.S.) 60.

will call the claimants, had acquired an inchoate and imperfect title which would undoubtedly have been in due course made absolute by the Court in Paris, unless this Court thought fit to intervene.

It will be convenient to consider the case first without reference to the appointment of the receivers, and on the assumption that the debenture-holders have a security which is no longer a floating security, but has become enforceable. It is plain that, according to English law, the debenture-holders have by contract with the company a charge upon all the assets of the company, including this French debt, and the first question which arises for consideration is this: Does the existence of this charge, which is undoubtedly valid according to English law, entitle the debenture-holders to prevent the claimants, who are unsecured creditors and not debenture-holders, from asserting and enforcing the rights that are given to them by French law against this French debt? In other words, is there any equity in favour of the debenture-holders as against the claimants? I think this question must be answered in the negative. The very point seems to have been decided by Wood V.-C. and Lord Chelmsford in *Liverpool Marine Credit Co.* v. *Hunter* (1) in the case of a ship. The mortgagees of a ship were there held not entitled to prevent an English unsecured creditor of the shipowner from taking proceedings at New Orleans which would result in judgment against the ship in disregard of the mortgage, the law of Louisiana declining to recognise the mortgage as valid; see also *Norton* v. *Florence Land and Public Works Co.* (2) It was urged before me that this doctrine applies only to immovable property or to movable property having actual locality, and that a chose in action has no locality: *Lee* v. *Abdy.* (3) But for many purposes a debt is deemed to have a locality: see *Commissioner of Stamps* v. *Hope* (4), or, as it is sometimes stated, a quasi locality. It seems to me that I must treat the debt due from Delaunay & Cie. as being situate in France, and subject to the French law, and I cannot therefore prevent the claimants, at the suit of the

(1) L. R. 4 Eq. 62; 3 Ch. 479.
(2) (1877) 7 Ch. D. 332.
(3) 17 Q. B. D. 309.
(4) [1891] A. C. 476.

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debenture-holders, from taking any proceedings the law of France allows for recovering their debt out of this French asset.

The next question, or rather the same question in a different aspect, is this. The debenture-holders having according to English law a good assignment of the French debt, but having according to French law no such assignment, and the claimants having according to French law a good inchoate charge or assignment, which ought to prevail? It seems to me that I am bound to hold that that assignment which alone is recognised by the law of France ought to prevail, and that the claimants have a better title than the debenture-holders. This is the view taken by Mr. Dicey in his work on the Conflict of Laws, rule 141: "An assignment of a movable which cannot be touched, i.e., of a debt, giving a good title thereto according to the lex situs of the debt (in so far as by analogy a situs can be attributed to a debt), is valid." I am not satisfied that the authorities cited by him necessarily involve this principle; but I think it is correct, and, indeed, is a necessary consequence from the admission that a debt has a locality or quasi-locality. Apart, therefore, from the appointment of the receivers, I think the claimants ought to succeed.

It remains to consider whether the appointment of receivers makes any difference. It was argued with great force that the receivers were appointed over all the property comprised in the debentures, and that it was contempt of Court to intercept the property which ought to come into the hands of the receivers. On the other hand, it was argued that the order appointing receivers in this general form did not extend to property abroad, and that in any view there had been no interference with the possession of the receivers sufficient to constitute a contempt.

It is not altogether easy to ascertain the origin, nature, and extent of the powers of a receiver. A receiver is an officer of the Court, and the Court does not allow the possession of its officer to be interfered with without its leave. When the Court appoints a receiver it requires the parties to the action to give up possession to the receiver of all property comprised in the

order, and treats them as guilty of contempt if they refuse to do so. The Court will grant a receiver a writ of possession (Order XLVII., r. 2), or a writ of assistance (*Wyman* v. *Knight* (1)), to enable him to recover possession, and it will order tenants to attorn to the receiver. So long as the property is within the territorial jurisdiction of the Court, there is no difficulty, at least in theory, in putting the receiver in actual possession. And when the receiver is in possession, the Court does not allow his possession to be interfered with without leave. For example, no judgment creditor of the company would be allowed to levy execution upon the property of the company in England now in the possession of the receivers. It is well settled that the Court can appoint receivers over property out of the jurisdiction. This power, I apprehend, is based upon the doctrine that the Court acts in personam. The Court does not, and cannot attempt by its order to put its own officer in possession of foreign property, but it treats as guilty of contempt any party to the action in which the order is made who prevents the necessary steps being taken to enable its officer to take possession according to the laws of the foreign country. See *Keys* v. *Keys* (2), where special directions were given to a receiver as to the best mode of getting in an Indian debt; and *Smith* v. *Smith* (3), where it was pointed out that a receiver of property in Jersey and in France would have to recover possession according to the laws of those countries; and in *Houlditch* v. *Marquis of Donegal* (4) the House of Lords held that the Court of Chancery in Ireland ought to appoint a receiver in a suit instituted to carry into effect a decree of the Court of Chancery in England by which a receiver had been appointed over estates in Ireland. In other words, the receiver is not put in possession of foreign property by the mere order of the Court. Something else has to be done, and until that has been done in accordance with the foreign law, any person, not a party to the suit, who takes proceedings in the foreign country is not guilty of a contempt either on the ground

(1) (1888) 39 Ch. D. 165.
(2) (1839) 1 Beav. 425.
(3) (1853) 10 Hare, App. lxxi.
(4) (1834) 8 Bli. (N.S.) 301; 37 R. R. 181.

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of interfering with the receiver's possession or otherwise. For this purpose no distinction can be drawn between a foreigner and a British subject. I have not been able to find any authority in which this precise point has been discussed; but on general principles I think I should not be justified in holding that the claimants by taking proceedings in Paris were in any way guilty of a contempt of Court.

If, however, I am wrong in this view, and there has been a contempt, it seems to me that I ought to allow the claimants to proceed, notwithstanding the appointment of a receiver. It cannot be reasonable that I should deprive English creditors of a right against French assets which French creditors undoubtedly enjoy.

Upon the whole, I think the application fails, and I must order payment of the dishonoured bill and the costs of the French proceeding and the costs of this application out of the fund in court, and the plaintiff must also pay the amount, if any, by which the fund in court is insufficient to answer these costs.

Solicitors: *Nicholson, Graham & Graham; Tarry, Sherlock & King.*

W. C. D.

CARR *v.* LYNCH.

FARWELL J.

1900

March 12.

[1899 C. 1195.]

Landlord and Tenant—Agreement for further Lease—Memorandum—Lessee not Named—Person who paid 50l.—Sufficient Description—Statute of Frauds.

A landlord verbally agreed to grant his tenant, the assign of an existing lease of the Warden Arms, a further lease of twenty-four years for a fine of 50*l.*, on receipt of which sum in cash the landlord signed and handed to the tenant the following memorandum:—

". . . . Dear Sir,—In consideration of you having this day paid me the sum of 50*l.* . . . I hereby agree . . . . to grant you . . . . a further lease of 24 years . . . . of . . . . the Warden Arms . . . . to run immediately after the expiration of . . . . the now existing lease. . . ."

The name of the proposed lessee was not stated in this memorandum:—

Held, that, for the purposes of the Statute of Frauds, the proposed lessee was sufficiently described as the person who had paid the 50*l.*

Whether the reference to a further lease would by itself have identified the proposed lessee with the existing tenant, *quære*.

WITNESS ACTION.

This was an action for specific performance of an agreement to grant a lease.

The defendant relied on the Statute of Frauds.

By a lease dated June 24, 1885, the defendant demised the Warden Arms, Kentish Town, to Charles Smith for the term of twenty-eight years from June 24, 1885, at the rent of 50*l.*

On September 27, 1898, this lease was assigned to Jayne.

On December 30, 1898, the defendant agreed with Jayne to grant him an extension of the lease for the further term of twenty-four years, for a fine of 50*l.*, on receipt of which sum in cash the defendant signed and handed to Jayne the following memorandum:—

"3, Avenue Villas, Cricklewood,
"London, N.W.,
"Dec. 30th, 1898.

"Dear Sir,—

"In consideration of you having this day paid me the sum of 50*l.* (fifty pounds) I hereby agree and undertake to

FARWELL J. 1900 CARR v. LYNCH.

grant you or your assigns a further lease of 24 years (twenty-four) 'W. L.' of the premises known as the 'Warden Arms,' 27, Warden Road, Kentish Town, London, N.W., to run immediately after the expiration of the term granted by the now existing lease dated the 24th day of June, 1885, and made between William Lynch and Charles Smith of the premises. Such the new lease to be subject to the same rental, 50*l.* (fifty pounds), and to contain similar covenants and conditions as are contained in the now existing lease.

"(Signed) William Lynch.

"Witness; Arthur Frederick Keeves Jayne."

The existing lease and the benefit of the extension agreement were subsequently assigned to the plaintiff.

The plaintiff was prepared if necessary to call evidence to prove that Jayne intended to sign as a party to be bound, and that the word "witness" was left in by mistake, the memorandum having been drawn on the assumption that a witness was necessary. The defendant admitted the receipt of the 50*l.* from Jayne, but alleged that he had only intended to agree to an extension of fourteen years. He submitted that the memorandum did not describe the proposed lessee with sufficient clearness to satisfy the Statute of Frauds.

This point was first argued, to avoid calling unnecessary evidence.

Younger, *Q.C.*, and *W. Baker*, for the plaintiff. The proposed lessee was sufficiently defined in the memorandum. First: He was the person who paid the 50*l.*, admittedly Jayne. Secondly: A "further lease" could only be granted to the existing lessee, i.e., Jayne.

Ingpen, *Q.C.*, and *A. L. Ingpen*, for the defendant. First: Non constat that only one person paid 50*l.* on December 30, 1898. Secondly: A further lease might mean a reversionary lease, which could be granted to anybody. The description is, therefore, insufficient: *Potter* v. *Duffield* (1); *Williams* v. *Jordan* (2); and no evidence or admission of identity can be received.

(1) (1874) L. R. 18 Eq. 4. (2) (1877) 6 Ch. D. 517.

FARWELL J. I should be sorry if I had to allow the defendant's plea of the Statute of Frauds to prevail in this case. According to the rule as stated in *Potter* v. *Duffield* (1), the statute is satisfied if the parties are sufficiently described, so that their identity cannot be fairly disputed. In this case it is plain on the memorandum that the lease is to be granted to the person who paid the 50*l*. This is quite as good a description as the word "proprietor," which was held sufficient in *Sale* v. *Lambert* (2), and it is admitted in the defence that that person was Jayne. If further authority is wanted, there is the recent case of *Plant* v. *Bourne*. (3) Id certum est quod certum reddi potest.

A further point, which by itself might have been more difficult, is the reference to "a further lease." If, however, I had felt any doubt on the first point, the employment of this phrase would in this case have removed it, though apart from the context the phrase might only have pointed to a reversionary lease.

The alleged mistake as to the word "witness" might also have been relied on if it had been necessary to hear the evidence. But the first point is sufficient to dispose of the case, and I give judgment for the plaintiff with costs.

Solicitors: *Williamson, Hill & Co.; Leggatt, Rubinstein & Co.*

(1) L. R. 18 Eq. 4. (2) (1874) L. R. 18 Eq. 1.
(3) [1897] 2 Ch. 281.

G. R. A.

FARWELL J.

1900

March 5, 6.

MAY *v.* PLATT.

[1899 M. 888.]

Vendor and Purchaser—Covenant for Title—Prior Document with Plan—Conveyance of Estate Term and Interest—Written Contract—Mistake—Rectification—Parol Evidence—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*a*).

By a conveyance expressed to be supplemental to a "principal agreement," under which the vendor was entitled to a lease of certain land coloured red in the plan annexed to that agreement, the vendor (in pursuance of a written contract in that behalf) as beneficial owner conveyed to the purchasers "all his estate term and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement":—

Held, that the words "if any" could not be implied after the word "interest," but that the statutory covenant for title extended quoad the estate to that limited by the principal agreement, and quoad the parcels to the entirety shewn in the plan.

Delmer v. *M'Cabe*, (1863) 14 Ir. C. L. Rep. 377, explained.

The parcels being deficient, the purchasers sued on the covenant. The vendor alleged mutual mistake, and alternatively unilateral mistake on his own part, and counter-claimed for rectification of the conveyance:—

Held, that, the written contract and conveyance being unambiguous, parol evidence of mistake was inadmissible after completion either as a defence to the action, to which it afforded no answer: *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616; *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11; or to support the counter-claim, which amounted to claiming specific performance of a written contract with a parol variation: *Davies* v. *Fitton*, (1842) 2 D. & War. 225.

Semble, *Harris* v. *Pepperell*, (1867) L. R. 5 Eq. 1, *Garrard* v. *Frankel*, (1862) 30 Beav. 445, and *Paget* v. *Marshall*, (1884) 28 Ch. D. 255, can only be supported on the ground of fraud; in the absence of fraud, vendors or purchasers of land cannot be put to their election to rescind or accept rectification, on the ground of unilateral mistake.

WITNESS ACTION.

This was an action by purchasers for damages for breach of the vendor's covenant for title implied by the Conveyancing Act, 1881, s. 7, sub-s. 1 (*a*).

Under an agreement of June 13, 1891, hereinafter called the principal agreement, the defendant was entitled (inter alia) to a lease of the land coloured red in the plan thereto annexed.

By a conveyance dated November 30, 1898, expressed to be supplemental to the principal agreement, reciting that the plan annexed to the conveyance was an exact copy of the plan annexed to the principal agreement, including the exact delineation of the land coloured red, the defendant, in pursuance of a written contract in that behalf, as beneficial owner assigned to the plaintiffs all his estate term and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement.

It appeared that, on a resurvey of the property made by the lessors towards the end of 1891, the defendant had given up his interest in a small portion of the land coloured red, hereinafter called plot A, for readjustment of boundaries. The plaintiffs, alleging that they first discovered the deficiency after conveyance, claimed damages for breach of the covenant for title to plot A.

The defendant alleged that the plaintiffs' agent was shewn a correct plan before the contract for sale was signed, and intimated to the defendant's agents that the difference in the amount of the land was immaterial for the purposes for which it was required. The defendant also alleged that plot A had been included in the conveyance by inadvertence and contrary to the true intention of the parties, and on the ground of these allegations, which were denied by the plaintiffs, he counter-claimed for rectification of the conveyance.

Warmington, Q.C., and *MacSwinney*, for the plaintiffs. The defendant has broken the covenant.

The conveyance is in accordance with the written contract and evidence of mistake is inadmissible: *Davies* v. *Fitton* (1); *Cato* v. *Thompson*. (2) Even if the defendant's case could be proved it would be no answer to an action on the covenant: *Cato* v. *Thompson* (2); *Page* v. *Midland Ry. Co.* (3) The defendant's remedy, if any, would be rescission, and restitutio in integrum, and this he does not ask.

Rectification can only be obtained where the error is common

(1) 2 D. & War. 225. (2) 9 Q. B. D. 616.
(3) [1894] 1 Ch. 11.

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to both parties. In this case it would amount to granting the defendant specific performance of a written contract with a parol variation. This is contrary to the practice: *Marquis Townshend* v. *Stangroom.* (1)

Hughes, Q.C., and *Whinney*, for the defendant. The covenant is inapplicable. It is confined to "the subject-matter expressed to be conveyed." In this case there is no assignment of parcels, but merely of "the estate term and interest of the defendant under and by virtue of the principal agreement in the piece of land coloured red on the plan annexed to the principal agreement." This means "the estate term and interest if any." It was for the plaintiffs to ascertain the nature and extent of the interest: *Allen* v. *Holton* (2); *Sweet* v. *Brown* (3); *Delmer* v. *M'Cabe* (4); Rawle on Covenants for Title, 4th ed. pp. 525, 528, 530.

[*Warmington, Q.C.* American authorities ought not to be cited: *In re Missouri Steamship Co.* (5)]

Cooke v. *Founds* (6) is distinguishable. The vendor covenanted "that he was seised of a good estate in fee according to the indenture made to him by Woolaston his vendor." This covenant really guaranteed the effect of the indenture. There is nothing of the kind in the present case.

If the covenant is applicable the defendant is entitled to rectification on the ground of mistake. Where the parties are in the position of vendor and purchaser, so that the Court can remit them to their original position, it is not necessary that the mistake should be mutual. If not mutual, the remedy is rescission: *Mortimer* v. *Shortall* (7), but with an option to the plaintiffs of accepting rectification; Seton on Judgments, 5th ed. p. 1914; *Harris* v. *Pepperell* (8); *Garrard* v. *Frankel* (9); *Paget* v. *Marshall.* (10)

[FARWELL J. I agree with Mr. Dart's comment on the last three cases. He says: "It is, however, difficult to understand

(1) (1801) 6 Ves. 328; 5 R. R. 312.
(2) (1838) 37 Mass. 458.
(3) (1846) 53 Mass. 175.
(4) 14 Ir. C. L. Rep. 377.
(5) (1889) 42 Ch. D. 321, 330.
(6) (1661) 1 Lev. 40.
(7) (1842) 2 D. & War. 363.
(8) L. R. 5 Eq. 1.
(9) 30 Beav. 445.
(10) 28 Ch. D. 255.

the ground of these decisions. Either there has originally been a contract, in which case the Court cannot make a new one, or there has been no contract, in which case neither at law nor in equity is there anything to enforce": Dart on Vendors and Purchasers, 6th ed. p. 839. Surely the remedy, if any, is rescission.]

[*Warmington, Q.C.* Apart from unfair dealing, there cannot be rescission after conveyance: *Soper* v. *Arnold.* (1)]

We tender evidence to shew that the contract was intended to be made and the conveyance completed by both parties on the basis of the resurvey, and that there has been a mutual mistake. If the evidence falls short of that, it may shew that the parties were not ad idem.

[FARWELL J. refused to admit this evidence.]

No reply was called for.

FARWELL J. The plaintiffs ask for a declaration that the defendant is liable to make good the damage they have suffered by the breach on the defendant's part of the covenant for title implied in the conveyance of November 30, 1898.

It is said that the covenant is not applicable. That is a question of construction. The conveyance first refers to the principal agreement, under which the defendant held, and then the defendant conveys as beneficial owner all his estate term and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement. It is said that that is equivalent to saying "all such estate and interest if any" as the defendant may have in the piece of land coloured red, and, inasmuch as he had no interest at all in plot A, the covenant does not extend to it. In my opinion that is not a sound construction. Several cases have been cited, but the form of this conveyance appears reasonably plain. The words "all the estate term and interest" are put in with reference to the principal agreement and shew that what is conveyed is not freehold, but the estate limited by the principal agreement. There are two things to consider, namely, the quantum of the estate of the assignor and the limits

(1) (1887) 37 Ch. D. 96; (1889) 14 App. Cas. 429.

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of the property to which that estate applies. The quantum of the estate is limited to the estate which the defendant had under the principal agreement, and the limits of the property are defined by the part of the plan coloured red. The defendant covenants that he has the interest given to him by the principal agreement in the land coloured red. That is the fair and reasonable construction of the covenant. I treat the American authorities with respect, but they are decisions on the construction of other deeds, and do not assist me in the present case. The Irish case, *Delmer* v. *M'Cabe* (1), is also merely a decision on the words of a particular covenant. The point of the decision appears to me to be found on page 382, where Monahan C.J., construing the covenant, says: "There is no covenant that the party is seised in fee simple, or of any estate whatever; as is, to say the least of it, generally found in the conveyance of an estate of fee simple; or that he has power to convey a fee simple as for a freehold or any particular estate; but that he has good power to convey his estate and interest under the deed of 1841: saying, as I read it, almost in so many words—'I do not know what estate I have under the deed of 1841; whether it is freehold or chattel; but, whatever it is, I give it to you as I have got it: I have not done any act to dispose of it or incumber it; and, such as it is, I sell it to you.'"

That is merely a decision on construction, and it is not for me to say whether I agree with it or not. If it were intended as a decision that the generality of the witnessing part of a deed could be limited by reference to the covenant, it would be contrary to the opinion of the Court of Appeal in *Page* v. *Midland Ry. Co.* (2) I may observe that *Delmer* v. *M'Cabe* (1) is referred to in Elphinstone on the Interpretation of Deeds at p. 468, where the old English case of *Cooke* v. *Founds* (3) is cited as a decision to the contrary. On that point, therefore, I am of opinion that the covenant is applicable.

Then it is said that the plaintiffs by their agent knew of the diminution of the land coloured red before the date of the con-

(1) 14 Ir. C. L. Rep. 377. (2) [1894] 1 Ch. 11.
(3) 1 Lev. 40.

veyance. I have rejected evidence on that point altogether. First of all, I cannot admit it as a defence in the action. If there is a latent ambiguity in the description of the property conveyed so that the words used are susceptible of two meanings, parol evidence is admissible to shew that the facts within the knowledge of both parties agree with one only of the suggested meanings. But where there is, as here, no ambiguity at all, but the property is conveyed by a clear and definite description and plan, parol evidence to contradict the deed is altogether inadmissible. If authority is wanted for that proposition it is supplied by *Cato* v. *Thompson*. (1) *Page* v. *Midland Ry. Co.* (2) also shews that the generality of the covenant for title cannot be restricted by proving that the defect was known to the purchasers, i.e., in this case by shewing that the plaintiffs knew that the plan was coloured red beyond the true boundary. If the covenant is clear and refers to the property expressed to be conveyed, evidence is not admissible to contradict it, and even the recital in the conveyance in *Page* v. *Midland Ry. Co.* (2), shewing the defect, was held not admissible for that purpose, that being only an illustration of the principle that clear unambiguous words in the witnessing part of a deed cannot be contradicted by a recital.

I now come to the consideration of the counter-claim, which asks for rectification. In my opinion the evidence tendered to shew there was a mistake is inadmissible for this purpose also. In a suit for rectification, parol evidence of mutual mistake is of course admissible to shew that the completed deed is not in accordance with the true agreement between the parties; but when such agreement is itself in writing and is plain and unambiguous and in exact accord with the deed, it is obvious that the person claiming rectification must first rectify the agreement. But what does that involve? In a case like the present, where the vendor counter-claims for rectification only, he necessarily implies that he desires the transaction to stand as rectified, or, in other words, starting de novo with the contract, he first asks the Court to rectify it, and then to grant specific performance of the contract as rectified.

(1) 9 Q. B. D. 616. (2) [1894] 1 Ch. 11.

FARWELL J. 1900 MAY v. PLATT.

That is contrary to the well-settled practice, established by cases such as *Woollam* v. *Hearn* (1), that a plaintiff cannot obtain specific performance of a written contract with a parol variation. If further authority is wanted it will be found in *Davies* v. *Fitton* (2), where Lord St. Leonards says (3): "It is said, that there is a mistake in this deed; I, however, cannot see any. The question in the cause is, whether the lease has been prepared in conformity with the agreement; the plaintiffs say, that by the agreement I can reform the lease; if this be so, parol evidence is not required; but the parol evidence is tendered to shew that the lease is contrary to the spirit of the agreement"—that is, that it is not in accordance with the true intention of the parties—"inasmuch as there was something dehors the contract, agreed upon between the parties, which was omitted in the lease. Now the rule of law is so well settled, that it is idle to discuss it. How can I receive parol evidence on the part of a plaintiff to rectify a written agreement, of which he seeks a specific execution? I cannot decree a specific performance with the variation of a new term, no matter how inconsiderable that term may be,—as for instance, the payment of taxes,—nor how clearly that term may be proved by parol evidence; the Court cannot receive that evidence." Then he goes on a little later to say: "If the plaintiffs had come here to have the contract executed, I must have given them the precise lease, which actually exists. Can I now then reform this lease by that evidence, which, if the lease rested in fieri, would be inadmissible to aid in carrying it into execution? It would be more violent, I think, now to reform this lease by that evidence, than formerly to use it for the purpose of executing the contract."

That seems to me to be a clear decision that I cannot admit parol evidence to rectify a conveyance made in accordance with a written contract, without first rectifying the contract and enforcing it as rectified, and this I have already said I cannot do.

Then the defendant has pressed me to admit the evidence on

(1) (1802) 7 Ves. 211; 6 R. R. 113; 2 W. & T. 7th ed. p. 513.
(2) 2 D. & War. 225.
(3) Ibid. 232.

the ground that it would shew the parties were not ad idem, and the plaintiffs as defendants to the counter-claim would be put to their election to accept rectification or submit to rescission.

This case does not, I think, really arise for my decision at all, because I am bound to reject the evidence altogether. I would point out, however, that the counter-claim asks only for rectification. In my judgment, in order to get rescission after conveyance, the allegations would have had to be very different. I have always understood the law to be that in order to obtain rectification there must be a mistake common to both parties, and if the mistake is only unilateral, there must be fraud or misrepresentation amounting to fraud. It is true that Lord Romilly in *Harris* v. *Pepperell* (1) and *Garrard* v. *Frankel* (2), and perhaps Bacon V.-C. in *Paget* v. *Marshall* (3), appear to have shrunk from stigmatising the defendants' conduct in terms as fraud, but they treated it as equivalent to fraud, and in my opinion would have had no jurisdiction to grant the relief that they did in the absence of fraud. Rescission after conveyance of land can only be obtained on the ground of unfair dealing: see *Brownlie* v. *Campbell* (4), per Lord Selborne; *Soper* v. *Arnold* (5), per Cotton L.J. It is only necessary to say this in the present case, in consequence of the defendant's argument. If it were a case of fraud, which unravels everything, there would be no difficulty in looking into the evidence to see how the contract was induced, as well as how it was carried out. But in the absence of fraud, of which there is no suggestion, I cannot see how the evidence could be admitted for any purpose whatever. There will, therefore, be a declaration that the defendant is liable to make good the damage, and an inquiry as to the amount. The defendant must pay the costs of the action, the costs of the inquiry being reserved. The counter-claim will be dismissed with costs.

Solicitors: *Leighton & Savory; Field, Roscoe & Co., for Wrigley, Claydon & Trustram, Oldham.*

(1) L. R. 5 Eq. 1.
(2) 30 Beav. 445.
(3) 28 Ch. D. 255.
(4) (1880) 5 App. Cas. 937.
(5) 37 Ch. D. 102.

G. R. A.

BUCKLEY J.
1900
Feb. 5, 6, 7.

WEST HAM CENTRAL CHARITY BOARD *v.* EAST LONDON WATERWORKS COMPANY.

[1899 W. 2050.]

Landlord and Tenant—Waste—Sub-demise for Purpose of Rubbish Shoot—Alteration of Nature of Demised Premises—Public Health Acts Amendment Act, 1890 (53 & 54 *Vict. c.* 59), *s.* 25.

By a lease dated September 29, 1830, the plaintiffs' predecessors in title granted to the defendant company twelve acres of meadow land forming part of marshy land at West Ham, for ninety-nine years, at a certain rent, for the purpose of constructing a reservoir. The company did not construct a reservoir but used the land for grazing purposes down to 1896, when they sub-demised it to B. for the rest of the term less the last three days thereof at an increased rent, for the purpose of its being used by him as a rubbish shoot. B. took possession and shot quantities of hard and soft rubbish of all kinds on the land, thereby raising its surface about ten feet. The plaintiffs brought an action against the company and B. alleging that the acts of B. constituted waste and had been done with the authority of the company, and claiming an injunction restraining the bringing or permitting to be brought upon the demised land any rubbish, earth, or material, or otherwise committing waste thereon, and damages. The only value of the lands at the end of the term would be for building factories, to obtain a proper foundation for which it would be necessary to dig down to the original level of the land:—

Held, applying the test as to what is waste laid down in *Lord Darcy* v. *Askwith*, (1617) Hob. 234, that there had been such an alteration of the thing demised—irrespective of the question whether the added material was offensive or inoffensive—as to constitute waste; that it was no answer that the expense of digging down to obtain a proper foundation would be more than compensated by the increased rent which the reversioners would be able to obtain for the land in its heightened condition; that both defendants were liable in damages for the past acts of waste; and that they must be restrained from committing waste in the future.

Queen's College, Oxford v. *Hallett*, (1811) 14 East, 489; 13 R. R. 293, observed upon.

By a lease dated September 29, 1830, and made between William Strange, Joseph Moss, and Joseph Robinson, churchwardens of the parish of West Ham, in the county of Essex, and John Cooper, Abraham Lancaster, and Charles Marten, overseers of the poor of the same parish of the one part, and the defendants, the Company of Proprietors of the East London

Waterworks of the other part, after reciting as follows:— "Whereas the said company are desirous of constructing and establishing a reservoir of water in or upon the pieces or parcels of meadow land hereinafter described and hereby demised, and also of erecting, building, and completing upon the said land certain erections, buildings, and works necessary and expedient for the effectual formation and establishment of the same reservoir, and for the purposes aforesaid have applied to and requested the said churchwardens and overseers to grant them a lease of the said pieces of land and hereditaments hereinafter described and hereby demised, which the said churchwardens and overseers have agreed to do upon the terms and conditions and in the manner hereinafter mentioned,"—it was witnessed that, in pursuance of the said agreement and in consideration of the rents and lessees' covenants thereinafter reserved and contained, the churchwardens and overseers demised and leased unto the company, their successors and assigns, all those parcels of meadow or marsh ground (then one piece of ground only) with the appurtenances containing by estimation twelve acres, and commonly called Oxleas, lying and being in High Mead, Stratford, in the parish of West Ham aforesaid (being the land the subject of the present action), for the term of ninety-nine years from September 29, 1830, at the yearly rent (after the first six years of the term) of 70*l*. The lease contained covenants by the company that the company, their successors and assigns, would cleanse, maintain, repair, uphold, sustain, and keep up all sewers, ditches, gutters, drains, watercourses, wydraughts, gates, gate-irons, stiles, pales, posts, rails, wedges, mounds, banks, river walls, and fences whatsoever in, upon, or belonging to the said premises, and that the same premises, with the gutters, drains, &c., they would surrender and yield up at the end of the term, and also that they would not at any time or times during the continuance of the lease take or carry away from off the said premises any of the soil or earth or use the said demised land as or for a calico-printing ground, and further, that the company and their assigns for two years at least before the expiration or other sooner determination of the said term of ninety-nine years would drain, fill

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up, level, and make good all pits, holes, and excavations that might be dug or made by the company for the purposes aforesaid in or upon the said pieces or parcels of land and premises, and would for such two years as aforesaid lay down and sow the same pieces or parcels of land and premises so levelled and made good with grass-seeds to the intent that the same lands and premises might be reinstated and restored to the same plight and condition in which the same were previously to the granting of the lease, and would quietly leave, surrender, and yield up the same land so levelled laid down with grass reinstated and restored as aforesaid unto the said churchwardens and overseers and their successors at the expiration or sooner determination of the said term.

The demised land formed part of the lands belonging to the charities of the parish of West Ham, being the gift of Sir Jacob Garrard in 1653 for the poor of West Ham. By an order of the Board of Charity Commissioners for England and Wales, dated August 28, 1870, and made in the matter of the several charities in the parish of West Ham, in the county of Essex, comprising among other charities the charity called "Garrard's," it was ordered that the scheme set forth in the schedule thereto should be approved and established as the scheme for the future regulation of the said charities, and clause 1 of the schedule provided that the vicar, churchwardens, and overseers of the poor of West Ham and their respective successors for the time being (thereinafter referred to collectively as the central charity board) should be the trustees of the estates and property of the charities, and should have the administration and management thereof for the purposes of the scheme.

The waterworks company never wanted or made a reservoir on the land, and for many years the land was used practically for the purpose of grazing cattle only. It was marshy ground, low lying, and more or less damp. It was protected by the banks which surrounded it and its general height at the date when it was demised, and, before the operations below described commenced, was about twelve feet above ordnance datum, the banks which surrounded it being something like seventeen feet

above ordnance datum. There was a conflict of evidence as to how often, if ever, the land was under water, but it was certainly more or less marshy ground in 1892. From the correspondence in the case it was evident that in or prior to October, 1894, the defendant Base had made an application to the company for a lease of the land for a rubbish shoot, but that the company were not then prepared to entertain that application. Shortly afterwards negotiations between the company and Base with reference to the land passed into the hands of one Saville, who was an agent acting for the company, and (as his Lordship found) in the course of these negotiations Saville told Base that he could have the land for a shoot, but that there must be no shooting of offensive matter upon the land. His Lordship also found as a fact that the company did forbid house refuse and offensive matter of that kind to be shot on the land, and that (if anything in the case turned upon that) the company did not authorize Base to bring objectionable material upon the land. The result of the negotiations was that, on April 30, 1896, an underlease was granted by the company to Base whereby the same twelve acres were demised for the whole of the unexpired residue of the term, less the last three days thereof, at a rent of 105*l.* a year. The material parts of this lease were as follows: There were covenants on the part of the lessee "to maintain and keep in good and substantial repair all buildings and erections which may be built, erected, or placed in or upon the said premises or any part thereof, and cleanse, repair, and maintain all sewers, ditches, gutters, drains, watercourses, wydraughts," &c., subject to the proviso that, "if, owing to the filling up of the said land, any of the said sewers, ditches, gutters, drains, or watercourses are filled in or rendered useless or unnecessary, the lessee will, at his own expense, make and maintain such surface drainage and other sewers as may in the opinion of the lessors' engineer for the time being be necessary, and to the satisfaction of such engineer." Then followed a covenant not to do anything which would be a nuisance, and a covenant following the original lease, within two years previous to the expiration of the term, or on the earlier determination thereof,

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to drain, fill up, level and make good all pits, holes, and excavations dug or made by the lessee in or upon the said premises, and for such two years as aforesaid, or on such earlier determination, to lay down the same premises, so levelled and made good, and deliver the said premises so levelled, drained, and made good to the lessors; also a covenant not to do anything contrary to the provisions of the lease under which the lessors held the premises. The learned judge found, as more fully stated in his judgment, that the company knew their demise was for the purpose of using the land as a shoot for materials of some description, and that they authorized Base to heighten the level of the land.

Base carried on the business of a "house breaker"—that is to say, a person who pulls down houses and removes the materials—and from that work he had a vast amount of bricks, brick rubbish, mortar, the products of excavations of houses and the foundation of the houses, and other solid material of that description. He also collected a vast lot of other materials, including what was known as "slop mud," refuse from the street, sweepings, and heterogeneous matter of a very varied description, and he brought on the land, not only the material resulting from pulling down houses, but also ordinary dust-bin refuse, vegetable matter, sweepings up from the markets, old tin cans, tins, bottles, broken jars, clothes, sacks, road scrapings and sweepings, mud, ashes, dust, cartloads of paper, and all sorts of things of that kind. The whole result of what had been done was that the greater part of the twelve acres had been raised by a height of something like ten feet. The surface at the date of the trial was very irregular, and it was proved that to cover the whole area to the height of ten feet would take 190,000 loads of stuff, and that some 150,000 or 160,000 loads of stuff and heterogeneous material had already been placed there, about 100,000 loads consisting of house-breaking materials, brick and brick rubbish, and excavations and materials of that description, about 51,000 of "slop," that is to say, mud scrapings and sweepings and so on. About 16,500 loads of the deposited stuff consisted of house refuse or dust and smaller loads of other things, namely, about 1300 of "soft

core," 190 of hard core, only seven loads of paper (as paper), and about 139 loads of tins, old baths, and things of that sort. Paper and things of that kind were burnt to a large extent. About 50 per cent. of the shoot rubbish consisted of ashes and inoffensive material of that description, and the other 50 per cent. consisted of, or, at any rate, included, a very large amount of vegetable refuse, such as cabbage-stalks, &c., the refuse from vegetables which are consumed in houses and which is cast into the dust-bins and carried away with the dust. The vegetable refuse was not burnt to any great extent, and a large portion of it was covered up. In addition to vegetable refuse, there was a large amount of objectionable matter in the shape of sweepings from the roads.

His Lordship, on a review of the evidence, was not satisfied that the offensive matter would have disappeared at the end of the term granted by the underlease. The future of the land was agreed to be the use of it for building factories, and not dwelling-houses, and it was alleged that to prepare it as a site for factories it would be necessary to cut through the ten feet of accumulated matter, at least down to the original level, before a proper foundation could be found.

This was an action by the West Ham Central Charity Board, as plaintiffs, against the waterworks company and Base for an injunction to restrain the defendants, "their officers, contractors, servants, agents, and workmen from bringing, or permitting to be brought, upon the said lands any rubbish, earth, or material, or otherwise committing waste on the said land, and from permitting any rubbish, earth, and material so brought, or permitted to be brought, to remain on the said land," and for damages.

The plaintiffs by their statement of claim alleged that by the aforesaid acts of the defendants the level of the demised premises had been greatly raised and the condition thereof materially and injuriously altered; that the reversion of the plaintiffs in the premises had been and was being permanently injured; that the acts of Base constituted waste, and had been done with the knowledge and connivance of the waterworks company and in pursuance of an arrangement in that behalf between the

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respective defendants, and that by the aforesaid acts of the defendants the value of the plaintiffs' reversion in the said hereditaments had been greatly diminished, and also that unless such acts were restrained and discontinued the value of the plaintiffs' reversion in the said hereditaments would be entirely destroyed, and the said hereditaments would be rendered valueless for any purpose whatsoever.

The action was tried before Buckley J. on February 5, 6, and 7, 1900.

Before the trial the Official Trustee of Charity Lands was added as a co-plaintiff, and at the trial leave to amend was given by substituting for the West Ham Central Charity Board the names of the persons who were then the vicar, churchwardens, and overseers.

Astbury, *Q.C.*, and *àBeckett Terrell*, for the plaintiffs. The defendants are committing waste. Ordinary or legal waste as distinguished from equitable waste consists in the commission of acts which, from his limited interest in the property, the tenant has no authority to do, namely, acts which change without bettering the nature of the property, or which, though effecting a personal benefit, diminish the value of the inheritance: Yool on Waste, p. 1; Seton on Judgments, 5th ed. p. 478.

[BUCKLEY J. That definition is not enough for your purpose.]

That is true in a sense. The Court has to consider whether the defendants are altering the character of the land, and if so, whether they are altering it to the prejudice of the owners of the property. The authorities are numerous; but there is no reported case exactly like this. "Bettering" in the definition does not mean that the property apart from the works is bettered in money value at a particular date. It does not better the property to take away from the owner the advantage of the acts which are said to better it, e.g., by shewing that it would cost 10,000*l.* to fill up the land and make it of any use, there is no betterment proved if it is shewn that the tenant gets 100,000*l.* for what he does, and that that sum would go

into the owner's pocket if he had back the property in such a condition that he might let it for the object by the accomplishment of which the tenant has made profit. There may be what is called ameliorating waste, which improves the inheritance although it is technically, according to the common law, waste, and in those cases equity would leave the party objecting to obtain such damages as he might think he could obtain, and would only relieve by injunction where substantial damage would accrue: *Doherty* v. *Allman*. (1)

[BUCKLEY J. The case does not assist us much.]

Ploughing meadow land is waste: *Simmons* v. *Norton*. (2)

[BUCKLEY J. If there is a simple demise of twenty acres of Blackacre, is building upon it waste?]

That would be waste, unless the building improved the land and the inheritance: *Jones* v. *Chappell*. (3)

[*Birrell, Q.C.*, referred to *Meux* v. *Cobley*. (4)]

That was a case of ameliorating waste in which not only the land, but also the inheritance, was improved.

Inclosing and ploughing up waste land is waste: *Queen's College, Oxford* v. *Hallett* (5), a case which reaffirms the principle that there may be actionable waste by an act which may be put right before the lease expires. Primâ facie an alteration in the character of the property is waste, but, if the alteration is for everybody's benefit, no one can complain. [He also referred to *London Corporation* v. *Hedger*. (6)]

Cripps, Q.C., and *J. G. Wood*, for the defendant company. The waterworks company should not have been joined as defendants. The first point is that the action is brought in respect of a tort and that the company are not tortfeasors, for everything complained of has been done by Base. To make the company liable, it must be shewn that they have wilfully assisted in the doing of an unlawful act: Addison on Torts, 7th ed. p. 93. The second point is that, assuming the company only let the land to Base with the knowledge that he

(1) (1878) 3 App. Cas. 709.
(2) (1831) 7 Bing. 640; 33 R. R. 588.
(3) (1875) L. R. 20 Eq. 539.
(4) [1892] 2 Ch. 253.
(5) 14 East, 489; 13 R. R. 293.
(6) (1810) 18 Ves. 355.

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was to use it for shooting foundation material, that, if done, would not be waste, although it raised the level of the land.

The non-prohibition of a tort in an underlease does not make the person granting it a tortfeasor if the sub-lessee commits a tort. If the land had been let for a rubbish shoot, and rubbish-shooting were waste, the company would be liable. But if the shooting of objectionable matter only causes waste, and the company do not authorize that kind of shooting, the company are not liable, for they had no power to intervene. There is only one case in which the lessee has been held liable where the actual occupier has committed the waste—taking gravel in that case—and there what was done was authorized by the terms of the lease: *Huntley* v. *Russell.* (1) If the lessee colludes with the sub-tenant, then they are both liable, as shewn by *London Corporation* v. *Hedger.* (2) The case as to waste is very like that as to nuisance, in respect of which the owner is not liable for injuries committed by the occupier of the property if he is not in possession: *Rich* v. *Basterfield* (3); *Harris* v. *James* (4); Woodfall's Landlord and Tenant, 16th ed. p. 775.

[BUCKLEY J. referred to *Rosewell* v. *Prior.* (5)]

That only applies where there is a nuisance to start with, when the premises are let.

With regard to the test of what is restrainable waste, *Doherty* v. *Allman* (6) shews that no injunction will be granted where the waste improves, or would only trivially affect the inheritance.

[BUCKLEY J. Is not the test whether the act said to constitute waste changes the character of the thing demised, having regard to *Greene* v. *Cole* (7) and *Lord Darcy* v. *Askwith*? (8)]

The change may be technical waste, but it does not follow that it will be restrained: *Doherty* v. *Allman* (6); *Meux* v. *Cobley.* (9)

(1) (1849) 13 Jur. 837.
(2) 18 Ves. 355.
(3) (1847) 4 C. B. 783.
(4) (1876) 45 L. J. (Q.B.) 545.
(5) (1701) 2 Salk. 460.
(6) 3 App. Cas. 709.
(7) (1670) 2 Saund. 228.
(8) Hob. 234.
(9) [1892] 2 Ch. 253.

If liability is established, the damages are not necessarily what it will take to restore the property to its former condition; what will be awarded is the amount of the diminution in the value of the reversion, less a discount for immediate payment: *Whitham* v. *Kershaw*. (1) There is nothing here to shew that any damage to the reversion will be caused.

Lastly, in reviewing the reported cases, the Court should be careful to distinguish those in which what was complained of was a breach of covenant.

Birrell, Q.C., and *Scarlett*, for the defendant Base. If Base had employed the best possible material, and at the end of the term gave up to the reversioners a fine level gravel site suitable for building purposes and above high water-mark, would that be waste? The lease to the company was not an agricultural lease. The land when restored was to be of as high a level as when it was first let, and it is agreed that it is best suited for the building of factories. The parcels in the lease shew that it was then meadow or marsh land, and the intention of the lessors is not strongly shewn except that the land was not to be lowered.

Having regard to all the circumstances, including the use of the surrounding land, the nature of the thing demised has not been changed and there has not been waste. If there is any waste it is ameliorating waste — that is to say, if proper materials have been added, the land in 1929, when the lease expires, will be more valuable as land for the only purpose for which it can be used than if it were restored with a rank herbage over the original level.

The evidence does not shew that the materials placed on the land will render it unsuitable for building upon at the end of the term. The mere fact that the user by the lessee is at a profit does not make what is done waste. The fact that by the user the landlord could not at the end of the term earn money by letting the land for similar purposes is not inconsistent with the land being improved in value. Nor does it follow that when the reversion falls in there will be a demand for rubbish shoots.

(1) (1885) 16 Q. B. D. 613.

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The plaintiffs are precluded, by allowing things to go on for a long period without complaint, from asking for a mandatory injunction.

Astbury, *Q.C.*, in reply. It is not proposed to ask for a mandatory injunction; but the plaintiffs are entitled to relief, namely, to damages for past acts of waste, and an injunction to prevent waste in the future. Independently of the quality of the added materials, waste has been committed. To change the nature of the thing demised is to commit waste, whether an improvement is thereby effected or not. The principle is stated in *Lord Darcy* v. *Askwith* (1), and many cases on the subject of waste are referred to in 2 Wms. Saund. 644 et seq. *Doherty* v. *Allman* (2) is the only case of modern times which lays down the principle of ameliorating waste, and the circumstances were very different from those of this case. Moreover, the materials placed on the land are improper, even if the defendants can deposit proper materials.

As to the company being proper parties, there is no analogy between waste and nuisance. Nuisance is a common law action like trespass; it can be brought against a stranger, and has nothing to do with tenure. An action for waste originally could only be brought against a tenant by operation of law, such as a tenant by the curtesy or in dower. It was extended to lessees by the Statute of Gloucester. Every lessee is liable for waste done on the land by whomsoever it is committed: *Attersoll* v. *Stevens*. (3) The company have undoubtedly let the land for use as a rubbish shoot, and they and Base are liable for what he has done.

Even if the case of nuisance is analogous, *Harris* v. *James* (4) is an authority in the plaintiffs' favour.

BUCKLEY J. In this case the plaintiffs are entitled to the reversion expectant upon the determination of a lease granted on September 29, 1830, by their predecessors in title to the East London Waterworks Company. It is a lease of twelve

(1) Hob. 234.
(2) 3 App. Cas. 709.
(3) (1808) 1 Taunt. 183; 2 Wms. Saund. 658; 9 R. R. 731.
(4) 45 L. J. (Q.B.) 545.

acres of land situate in West Ham, in the parish of Stratford, and the case of the plaintiffs is that the defendants, the Waterworks Company, and Mr. Henry Base, trading as J. C. Base, are liable to the plaintiffs for waste permitted on the premises which are the subject of the demise.

Before stating the facts of the case, I think it would be convenient that I should state what I understand to be the law which I have to apply to them. The best definition of waste that I have been able to find is in *Lord Darcy* v. *Askwith* (1), which is in these words: "It is generally true, that the lessee hath no power to change the nature of the thing demised; he cannot turn meadow into arable, nor stub a wood to make it pasture, nor dry up an ancient pool or piscary, nor suffer ground to be surrounded, nor decay the pale of a park; for then it ceaseth to be a park, nor he may not destroy nor drive away the stock or breed of any thing, because it disherits and takes away the perpetuity of succession, as villains, fish, deer, young spring of woods, and the like; but he may better a thing in the same kind, as by digging a meadow, to make a drain or sewer to carry away water." The test, as there laid down, seems to be whether the act which the lessor says is an act of waste by the lessee is an act which alters the nature of the thing demised. At one time this principle of law seems to have been carried so far that it was supposed that it was waste for a tenant to build a new house on the land demised, and in Co. Litt. 53a, the law is to be found stated thus: "If the tenant build a new house it is waste"; and in a case, which was cited in the course of the opening by Mr. Astbury, of *Queen's College, Oxford* v. *Hallett* (2), I find Lord Ellenborough saying this: "It is an injury to the title of the reversioners, and a present damage to them. Lord Mansfield held that building a wall, where none was before, was sufficient to entitle the reversioner to this kind of action pending the lease, though it might be pulled down again before the lease expired." If that was the law at one time, I think it is plain that it is not the law now. For that I may refer to *Jones* v. *Chappell* (3), a decision of the late Sir George Jessel, where he held that the lessee of land who erects

(1) Hob. 234. (2) 14 East, 489; 13 R. R. 293. (3) L. R. 20 Eq. 539.

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buildings thereon without the consent of his lessor does not commit waste within the definition in Co. Litt. 53 a, unless it can be shewn that such building is an injury to the inheritance. I am content to take the law from the case of *Doe* v. *Earl of Burlington* (1), and I will read from p. 517: "Upon the whole, there is no authority for saying that any act can be waste which is not injurious to the inheritance, either, first, by diminishing the value of the estate, or, secondly, by increasing the burthen upon it, or, thirdly, by impairing the evidence of title. And this law is distinctly laid down by Chief Justice Richardson in *Barret* v. *Barret* (2), cited at the bar from Hetley's Reports." If the permanent character of the property demised is not substantially altered, as for instance, by the conversion of pasture land into plough land, by breaking up ancient meadows, or the like, I conceive that the law is that it is not now waste for the tenant to do things which within the covenants and conditions of his lease he is not precluded from doing. Within those covenants and conditions he may use his holding as he pleases. And, as regards what is a dealing within the covenants and conditions of his lease, I may cite some words of Lord Eldon in *Church* v. *Brown* (3), and I will read from p. 268, where Lord Eldon says this: "The safest rule for property is, that a person shall be taken to grant the interest in an estate, which he proposes to convey, or the lease he proposes to make; and that nothing, which flows out of that interest, as an incident, is to be done away by loose expressions, to be construed by facts more loose; that it is upon the party, who has forborne to insert a covenant for his own benefit, to shew his title to it."

Here, therefore, it seems to me that what I have to investigate is, What is the nature of the property which was demised by the lease of 1830, and is the act which is being done by the defendants, or one of them—because there is some difference in their two cases—an act which alters the nature of the thing demised? Of course it lies on the threshold of that inquiry to see from the lease of 1830 what the thing demised was. [His Lordship referred to the terms of the lease, and

(1) (1833) 5 B. & Ad. 507; 39 R. R. 549.
(2) (1627) Het. 34.
(3) (1808) 15 Ves. 258; 10 R. R. 74.

continued :—] Now the effect of that lease seems to be that these twelve acres of ground were demised to the company with authority to alter the ground in a particular way. They might excavate it, and they might make a reservoir on it, but they were not to take away any soil displaced in the course of excavation. That was to be used, I suppose, to heighten the bank which surrounded it; and two years before the end of the term they were to reinstate the premises in their original condition and sow them again with grass-seed. [His Lordship then stated the facts as to the non-construction of the reservoir, the mode in which the land was used by the company, its condition, the negotiations for the underlease to Base, and the material provisions of the underlease, and then proceeded as follows :—] It seems to me plain that the authority which the Waterworks Company gave to Base was this. They knew perfectly well that the demise to him was to be a demise for the purpose of using the land for a shoot for materials of some description. I conclude as a matter of fact that they did not authorize him to shoot offensive materials, but that they authorized him to fill up and to increase the level of the land. That appears from the lease itself, from the words I have read as to filling up, and from Mr. Saville's evidence, that the demise was made to Base with an authority to him to place materials upon the land so as to increase the level of the land, but not so as to bring offensive materials upon it. [His Lordship then stated how the land had been used by Base, and continued :—] Now, what would be the condition of this heap of stuff at the end of twenty-nine and a half years? Would the offensive matter all have disappeared or would it not? If it would not have disappeared, then, under the by-laws, or under s. 25 of the Public Health Acts Amendment Act, 1890, the landowners might be forbidden to build upon the land at all. That section is as follows: "It shall not be lawful to erect a new building on any ground which has been filled up with any matter impregnated with fæcal, animal or vegetable matter, or upon which any such matter has been deposited, unless and until such matter shall have been properly removed by excavation or otherwise, or shall have been rendered or have become innocuous." I

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have to weigh the evidence before me as to whether or not the offensive matter will have disappeared at the end of the time, and I am not satisfied that it will; but I do not know that the determination of the case turns upon that. Now, passing on to the next part of the story, it is this. The surroundings of the land demised are covered with buildings. On the other side of the waterworks river, where the Carpenters' Estate lies, there are now a large number of factories, and, as regards that estate, it has been proved to my satisfaction that a large number of those factories are built upon lands which lie at a level at least as low as, if not lower than, the twelve acres with which I have to deal in this case. The parties are agreed that the future of this land is as a building site, not for dwelling-houses, but factories. The land is too valuable to be used as a site for cottages, but it is valuable as a site for factories. Another matter upon which the parties are agreed is that, if this ten feet of made land is left upon the original level, it will be necessary in erecting a factory or a heavy building upon the land to go down to the original level, and probably somewhat lower in order to reach a firm foundation. The plaintiffs, moreover, say that if the land remained at its original level a factory owner would give more for it, because factory owners generally want some place on which to deposit material from their works, and that, if the land required any filling up at all, a larger rent would be obtained from a factory owner by reason of the fact that there was an opportunity of getting rid of surplus material by filling up. I understand that to mean this: You have twelve acres of land. You might let an acre of it to a factory owner to build a factory upon with the right to deposit his spare materials upon the remaining eleven acres. You might have three or four factory owners, and they would pay more for the land by reason of the fact that they had an opportunity of depositing surplus material in the neighbourhood. Now, the question I have to investigate is this. Is this alteration of the land, by imposing upon it a heap of matter such as I have endeavoured to describe, an alteration of the nature of the thing demised? The defendants say, "No, it is not, in this sense, that although it is an alteration of the thing demised in

that, in order to build upon it hereafter you would have to do an act which if it were left in its original condition you would not have to do—that is to say, you would have to dig down through the ten feet of super-imposed material before you reached the foundations—the expense which would be incurred by this digging down for a better foundation would be more than compensated by the additional rent which you could get for the land." The land, they say, as raised, is more valuable, inasmuch as the increase in value will counterbalance the extra cost of going down to obtain foundations. This is an argument which comes to this: "It is allowable to alter the nature of the thing demised provided you so alter it that there is a countervailing advantage which reimburses you the additional expense which you are put to by the alteration." It seems to me that that is waste. Directly you admit that you have altered the thing as building land, so that you have to deal with it in a different way as building land, in my judgment you have, within the rule that I have endeavoured to lay down as regards waste, altered the nature of the thing demised.

Then there is another point of view from which you may look at it, and that is this: Supposing the landowner were minded to build cottages there and not factories—as he might do if he liked, although factories would be of more value—it is perfectly possible that with this heap of material on the land he would be forbidden to build dwelling-houses at all. The local authority has a right under s. 25 of the Public Health Act, 1890, to forbid dwellings to be put on land if the land be impregnated with fæcal, animal or vegetable matter. Why am I to expose the reversioner to the possibility of finding himself unable to build upon the land because of the deposit of this material upon it? The property demised is altered. Supposing the defendants are right in saying that the offensive matter would all decay in the period of thirty years, the landowner would be exposed to this—that he would have to prove to the satisfaction of the local authority that that was the case before he would be free from the veto against building on his land. Is not that an alteration of the nature of the thing demised? You have new conditions to comply with before you can use it in the way you could have used it before. It appears to me

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that that is such an alteration, and I need not say that the landowner ought not to be excluded from the opportunity of building cottages upon the land if he is so minded, although the land would be much more valuable for factories.

There is a third way of looking at it. Supposing the land had been left at its original level, what would the reversioners have come into at the end of the term? They would have come into the possession of property which, according to the defendants' view, cannot be reasonably or beneficially used for building until it is raised. Assume that is the case. The reversioners would have come into the enjoyment of a property out of which they could, in the first place, have recovered the rent or profit which is to be derived from allowing material to be shot there. They might have protected themselves by stringent conditions as to the quality of the material to be shot, and have got a perfectly good foundation. It is proved that the price obtained for shoots varies from 8*d.* to 1*s.* 3*d.* per load—very substantial payments indeed. That might have been recovered in the shape of additional rent from a factory owner who built one factory in the way I have suggested; or the landowners might have let to a contractor like Mr. Base, and given him permission to shoot such materials there, and have received the pecuniary benefit for allowing that to be done. The inheritance has lost that benefit. Why should not the plaintiffs have that which they are entitled to under the lease of 1830, namely, the land as it stood in 1830, sown with grass-seeds, with an opportunity for the reversioners to do what they will with it? It has struck me as strange, having regard to the fact that in many agricultural districts there exist mining industries in the immediate neighbourhood—and, as we know, mining industries produce a vast quantity of slag and other material to be got rid of—that there is not to be found any authority on the question whether the deposit of slag or additional material on land so as to increase its height, is or is not waste within the legal meaning of that term. Counsel have not been able to supply me with any authority on this point, and such research as I have been able to make has not enabled me to find any. Counsel for the waterworks company were not prepared to deny that, if the lessee were to use the land for the purpose of

erecting a small mountain upon it some 1000 or 1500 feet high, that would be such an alteration of the thing demised as would be waste. I suppose, on the other hand, the plaintiffs would not contend that, if the tenant top-dressed his land from time to time and added so many inches to the field, and altered the level slightly, that would be waste. It must be to a great extent a question of degree. It seems to me that here there has been such an alteration of the level of the soil, and such an alteration of the thing demised, as does amount to waste, irrespective of the question whether the material added has been of an offensive description or an inoffensive description. In other words, I think the waterworks company in authorizing Mr. Base to go there, and to do that which he did, are equally responsible in this action for the consequence of what has been done. Under those circumstances, it is unnecessary for me to follow counsel into the consideration of the question whether waste falls under the same category as nuisance, because it could not be denied that the authority given to Base was an authority to tip the material on the land, and to increase the height of the land; and, having given that authority, the company are responsible for the act done.

It appears to me, therefore, that the plaintiffs are entitled to an injunction restraining both the defendants, their officers, contractors, servants, agents, and workmen, from bringing, or permitting to be brought, upon the land any rubbish, earth, or material, or otherwise committing waste on the said land. The statement of claim goes on to ask for a mandatory injunction against permitting it to remain. I need not assign the reasons why I think such an injunction ought not to be granted, because the plaintiffs do not ask for it. But they ask for an inquiry as to damages, and I think they are entitled to an inquiry as to damages in the past and to an injunction as regards the future, and that they are, as against both the defendants, entitled to the costs of the action.

Solicitor for plaintiffs: *A. A. Banes.*
Solicitors for defendant company: *Bircham & Co.*
Solicitor for defendant Base: *G. Goodman.*

F. E.

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Feb. 14, 15.

TEBB *v.* CAVE.

[1899 T. 969.]

Landlord and Tenant—Covenant for Quiet Enjoyment—Breach by Erection of Buildings on adjoining Land causing Lessee's Chimneys to Smoke.

The defendant was the owner of two adjoining pieces of land. On one of these he erected a house which he demised to the plaintiff, with whom he covenanted for quiet enjoyment without any interruption or disturbance from or by the lessor, or any person lawfully or equitably claiming under him. The defendant then erected on the other piece of land buildings of such a height that they caused the chimneys of the plaintiff's house to smoke badly :—

Held, that the defendant had broken his covenant.

The defendant E. A. Cave was, at the date of the lease below mentioned, the owner of the dwelling-house No. 226, Finchley Road, in the parish of Hampstead, thereby demised, and of a piece of vacant land immediately adjoining the same on the north-west side thereof. The dwelling-house was three stories in height above the basement.

By a lease dated June 22, 1895, the defendant demised No. 226, Finchley Road to the plaintiff from June 24, 1895, for the term of twenty-one years, at the yearly rent of 130*l.*, and a smaller rent to cover insurance premiums. The lease contained a covenant by the plaintiff with the defendant that the plaintiff would not during the term use the premises "otherwise than as a private dwelling-house and the residence of a physician and surgeon," and the defendant covenanted with the plaintiff "that he, the said lessee, paying the yearly rent hereby reserved on the days and in manner aforesaid, and observing and performing all and every the covenants and agreements hereinbefore contained and by and on the part of the said lessee to be observed and performed, shall and may peaceably hold and enjoy the said premises during the term hereby granted without any interruption or disturbance whatsoever from or by the said lessor, or any person or persons lawfully or equitably claiming through under or in trust for them or either of them." And further, that on the plaintiff paying

the rents and performing his covenants, and if he should continuously carry on upon the premises the profession of a physician or surgeon, the defendant would not let any other of his houses therein mentioned for the profession of a physician and surgeon.

Soon after the lease had been executed, and after the plaintiff had been let into possession of the house thereby demised, the defendant built on his adjoining land flats and buildings about twenty feet higher than No. 226, Finchley Road, and thereby obstructed the access of air to the chimneys of the plaintiff's house, with the result that a number of the plaintiff's chimneys smoked, whenever fires were lighted in the rooms with which they communicated and the wind was in any direction except the north-west, to such an extent that certain rooms of the plaintiff were, while the chimneys were so caused to smoke, rendered uninhabitable when the wind was in the north-east or south-west, and at other times could only be used under circumstances of great inconvenience and discomfort. The rooms principally affected were the dining-room, drawing-room, and the four principal bedrooms. The plaintiff by his statement of claim alleged that by reason of the acts above mentioned he had been put to considerable expense and had suffered great damage, and he claimed (1.) a declaration that the defendant, by erecting upon the adjoining land flats and buildings of such a height and in such a manner as to obstruct the access of air to the chimneys of the plaintiff's house and thereby to cause the chimneys to smoke, had infringed the rights of the plaintiff under the lease; (2.) an injunction to restrain the defendant from erecting or permitting to remain erected upon the adjoining land any buildings so as to obstruct the access of air to the plaintiff's chimneys in such a manner as to cause the same to smoke; or, (3.) in substitution for the injunction, damages for the injury sustained by the plaintiff by reason of the wrongful acts of the defendant in erecting upon his adjoining land buildings as above mentioned to the injury of the plaintiff, in breach of the covenants on the part of the defendant contained in the lease and the obligations thereby imposed upon him.

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H. Terrell, Q.C., and *C. Lyttelton Chubb*, for the plaintiff. The defendant by erecting flats so as to cause the plaintiff's chimneys to smoke has broken the covenant for quiet enjoyment contained in the lease: *Sanderson* v. *Berwick-upon-Tweed Corporation*. (1) What has been done is also a derogation from the defendant's grant. If a man demises land to be used for a particular purpose, he cannot so use his adjoining land as to prevent the demised land from being reasonably used for that purpose: *Aldin* v. *Latimer Clark, Muirhead & Co.* (2); *Robinson* v. *Grave*. (3) In the present case the lease was granted with the knowledge that the plaintiff was going to use the house for the practice of his profession of a physician and surgeon, and, as the rooms cannot by reason of the defendant's acts be used for that purpose, the enjoyment of the house is interfered with. Practically the same principles apply in cases of derogation from grant, and breaches of covenants for quiet enjoyment are the same.

[BUCKLEY J. referred to Woodfall on Landlord and Tenant, 16th ed. p. 725, and *Dennett* v. *Atherton*. (4)]

What the defendant is doing is not such an ordinary and reasonable use of his own premises as to bring this case within the principle of *Robinson* v. *Kilvert*. (5)

As considerable delay has taken place in bringing the action, the plaintiff does not ask for a mandatory injunction, but only claims an inquiry as to damages.

Astbury, Q.C., and *J. F. Popham*, for the defendant. A lessor has never been held liable under a covenant for quiet enjoyment, in any reported case, where he has not physically interfered with the enjoyment of the property demised. There has been no physical interference in the present case. Different principles apply in the case of breach of covenant for quiet enjoyment and derogation from a grant. The only thing alleged against the defendant is that he has obstructed the access of air, and that is not a breach of the covenant: *Potts* v. *Smith*. (6) In *Sanderson* v. *Berwick-upon-Tweed Corporation* (1)

(1) (1884) 13 Q. B. D. 547.
(2) [1894] 2 Ch. 437.
(3) (1872) 21 W. R. 223.
(4) (1872) L. R. 7 Q. B. 316.
(5) (1889) 41 Ch. D. 88.
(6) (1868) L. R. 6 Eq. 311.

there was physical interference with the demised premises. A lessor's covenant for quiet enjoyment does not prevent him from completing on his adjoining land houses which to the lessee's knowledge had been commenced to be built at the date of the lease.

[They also referred, on the subject of breach of covenant for quiet enjoyment, to *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (1); *Jenkins* v. *Jackson*. (2)]

The whole theory of derogation from grant is founded on there being an implied obligation in the absence of special circumstances: *Birmingham, Dudley and District Banking Co.* v. *Ross*. (3) There can be no such implication in the present case, for the plaintiff knew when he took his lease that flats were being built on the adjoining property. Although it may have been shewn that the plaintiff's chimneys smoke, the smoking has not been caused by the defendant.

[They also referred to *Davies* v. *Marshall*. (4)]

No reply was called for.

BUCKLEY J. In this case the plaintiff, Dr. Tebb, in the early part of 1895, was minded to remove from the house he was then occupying and take the house No. 226, Finchley Road, which is the subject of this action.

The plaintiff practises as a physician and surgeon. The defendant, Mr. Cave, was in the early part of 1895 building the house which is now No. 226, Finchley Road. At the time when the lease was granted the house was not actually finished; how far it was from being finished I do not know exactly, but it was shortly afterwards finished and decorated to suit Dr. Tebb's taste. On June 22, 1895, the defendant executed to the plaintiff a lease of this house for twenty-one years from June, 1895, at a rent of 130*l*. a year and certain other small rents, and the lease contained a covenant by the lessee not to use the house otherwise than as a private dwelling-house and residence of a physician and surgeon; and a covenant by the lessor that he, the lessee, paying the rent and so on, should or

(1) [1898] 2 Ch. 394.
(2) (1888) 40 Ch. D. 71.
(3) (1888) 38 Ch. D. 295.
(4) (1861) 10 C. B. (N.S.) 697.

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might peaceably use and enjoy the demised premises during the term thereby granted, without any interruption or disturbance whatever from or by the lessor or any person claiming under him; and a further covenant that the lessor would not let or suffer to be sub-let any of certain houses of his, or portions of those houses, for the profession of a physician and surgeon.

At the date of the lease the defendant knew that the plaintiff wanted the house for occupation, to carry on there the profession of a physician and surgeon, that covenant being introduced into the lease for the plaintiff's protection in that respect. The plaintiff went into occupation on August 7 or thereabouts, he lived in the house for about a fortnight, and then went abroad, and was away from August 23 to September 21. At the time when the plaintiff went into occupation the defendant was erecting on an adjacent plot of ground, on the north-west side of the plaintiff's house, certain flats, and had carried the building up to something like ten feet from the ground, that is, to the top of Dr. Tebb's drawing-room window. The erection of the flats was continued while Dr. Tebb was away.

In January or February, 1896, Dr. Tebb made complaint.

The result of the evidence is that, both during the period from 1895 down to 1898 and subsequently, there was, and that at the present time there is, in this house a grievous annoyance from smoke.

Now, the question is whether under those circumstances the plaintiff is entitled to a remedy or not. The plaintiff's case has been put in two ways. It is said, first, that under the covenant for quiet enjoyment he is entitled to relief, because the acts which the defendant has done are an interference with the quiet enjoyment which he covenanted to give to his lessee; and, secondly, it is said that, apart from that, or in addition to it, the act which has been done has been done by the lessor in derogation of his grant, and that on that ground the plaintiff is entitled to relief. The cases which have been referred to on those two heads to some extent overlap each other; but I do not know that it is desirable or useful to keep them separate.

The first case referred to was *Robinson* v. *Grave* (1), and was a case upon derogation of the grant. Wickens V.-C. there said: "It seems to me upon general principles that a grant made expressly for the purpose of the grantee's building a house creates a legal easement over the adjoining land retained by the grantor to such an extent as may be strictly necessary for enabling the grantee to build the house and enjoy it when built; and where the grant does not notice the intention of building, but both grantor and grantee know that the purpose is building, an equitable right is obtained, coextensive with the legal right which would have been obtained if the grant had noticed the intention of building." Something was sought to be made by the plaintiff of the fact that it is plain that the defendant, when the lease of the house was granted, knew that the plaintiff proposed to practise there his profession of a physician and surgeon. I confess I do not think there is much to be made of that point. I have no doubt that a physician and surgeon does dislike smoky chimneys, but I do not know that he dislikes them more than any one else. Whether his house is occupied by patients or by visitors, or by himself and his family, he is entitled to enjoy it, I suppose, in a condition of reasonable comfort. The next case that was cited was much nearer the point which I have to decide. In *Dennett* v. *Atherton* (2) Willes J. stated the law in this way: "Now, there can be no doubt that a proceeding of the Court of Chancery, or of a Court of Common Law, interfering with the title and possession of the land, does amount to a breach of the covenant for quiet enjoyment: as in case of dower, common, rent, or such like. . . . On the other hand, it has long been settled that such a proceeding, interfering only with a particular mode of enjoyment of the land, or part of it, but not with the title or possession, is not a breach." If that were now the law, I might have much more difficulty in deciding this case in the plaintiff's favour than I now have. *Dennett* v. *Atherton* (2) was, however, considered and commented on in the Court of Appeal in *Sanderson* v. *Berwick-upon-Tweed Corporation*. (3) There the defendants, the corporation

(1) 21 W. R. 223, 225. (2) L. R. 7 Q. B. 316, 326.
(3) 13 Q. B. D. 547.

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of Berwick-upon-Tweed, had laid out a general system of drainage by which several farms were drained by several underground drains, with the result that the drainage water of one farm was carried through another farm. They let to the plaintiff one of their farms with the usual covenant for quiet enjoyment against the acts of the lessors, or any person lawfully claiming through or under them. They had previously let another of their farms, which lay above the plaintiff's farm, to a man named Cairns, with a right to use the drains through the plaintiff's land. Cairns was, therefore, a person lawfully sending water through the drains which passed through the plaintiff's land. In so doing Cairns sent water which caused damage to the plaintiff by an escape which arose from one of the drains being imperfectly constructed. It was held that the defendants were liable to the plaintiff for a breach of their covenant for quiet enjoyment in respect of that damage, because there had been within the meaning of the covenant a substantial interruption by a person who lawfully claimed through the defendants. In stating the law Fry L.J., who delivered the judgment of the Court, said this (1): "In coming to this conclusion we have not lost sight of the observations on the nature of such a covenant which were made by Willes J. in *Dennett* v. *Atherton*. (2) But it appears to us to be in every case a question of fact whether the quiet enjoyment of the land has or has not been interrupted; and where the ordinary and lawful enjoyment of the demised land is substantially interfered with by the acts of the lessor, or those lawfully claiming under him, the covenant appears to us to be broken, although neither the title to the land nor the possession of the land may be otherwise affected." Now, it is said by the defendant, and I think truly said, that *Sanderson* v. *Berwick-upon-Tweed Corporation* (3) is the utmost extent to which this law has been carried; but it is by that decision extended beyond cases of title or of possession to cases in which quiet enjoyment of the land is substantially interfered with by the acts of the lessor. That case was again referred to in the Court of Appeal in *Robinson* v. *Kilvert*. (4) In a subsequent case of *Aldin* v. *Latimer Clark*,

(1) 13 Q. B. D. 551.
(2) L. R. 7 Q. B. 316.
(3) 13 Q. B. D. 547.
(4) 41 Ch. D. 88, 96.

Muirhead & Co. (1), Stirling J., after travelling through the authorities, says this (2): "The result of these judgments appears to me to be that where a landlord demises part of his property for carrying on a particular business, he is bound to abstain from doing anything on the remaining portion which would render the demised premises unfit for carrying on such business in the way in which it is ordinarily carried on, but that this obligation does not extend to special branches of the business which call for extraordinary protection." In that case there was a demise for a particular purpose, and the question of derogation arose as well as that of breach of covenant for quiet enjoyment. Then the defendant has referred to *Manchester, Sheffield and Lincolnshire Ry. Co.* v. *Anderson* (3), where the present Master of the Rolls, referring to *Sanderson* v. *Berwick-upon-Tweed Corporation* (4), says this (5): "I will only add a few words about the covenant for quiet enjoyment because counsel for the defendant urged us to go to an extent rather alarming to real property lawyers. I take it that a mere temporary inconvenience caused by a lessor, not in depriving his tenant of a right of way, but in rendering his access less convenient than it was, is not a breach of covenant for quiet enjoyment. A temporary inconvenience which does not interfere with the estate or title or possession is not, to my mind, a breach of covenant, nor is there any case that goes anything like the length required to shew that it is. Even the judgment of Fry L.J. in the case that carried it farthest, *Sanderson* v. *Berwick-upon-Tweed Corporation* (4), in which he says that anything which substantially interferes with the enjoyment by the tenant is a breach of that covenant, must be taken with reference to the facts there before the Court, which were that water was poured on the land demised so as to interfere with the enjoyment of the demised property. It did not interfere with the possession, except in a very technical sense, and still less with the title. But to say that partly blocking up a public street, which is an inconvenience to the public and an

(1) [1894] 2 Ch. 437.
(2) Ibid. 444.
(3) [1898] 2 Ch. 394.
(4) 13 Q. B. D. 547.
(5) [1898] 2 Ch. 401.

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inconvenience to any one residing near the place, is a breach of covenant for quiet enjoyment, is going far beyond any authority I am aware of." That is the greatest qualification of *Sanderson* v. *Berwick-upon-Tweed Corporation* (1) which, so far as I know, is to be found.

Under those circumstances, what I have to consider is this: When the defendant, after granting the lease of June 22, 1895, to the plaintiff, and after he had covenanted with him for quiet enjoyment, put up upon adjoining land flats with a wall and roof and chimney-stacks, and so on, the result of which was to cause smoke to be driven down the plaintiff's chimneys by the impact of the wind, was he or was he not doing something which, although it did not affect the title or possession of the plaintiff's house, substantially affected the enjoyment of the house? It was argued for the defendant that in order to succeed the plaintiff must shew something in the nature of a physical interference. Supposing this to be so, it appears to me that this is physical interference. There is interposed something which causes the ordinary current of wind, which might or would be harmless in itself, to be diverted and driven down the chimneys, with the result that the chimneys smoke. It seems to me that that is a substantial interference with the enjoyment of the plaintiff's house, and is contrary to the covenant for quiet enjoyment, and that the act of the defendant is, therefore, a breach.

Under those circumstances I need not go on to consider how the matter would have stood if it had stood upon derogation from grant. The plaintiff in such case relies on certain facts as to the nature of the occupation of the premises, and in that connection it might have been necessary to consider those facts. I rest my decision on the covenant for quiet enjoyment, and it appears to me that the plaintiff is entitled to succeed. The plaintiff does not ask for an injunction, but he is entitled to an inquiry as to damages and to the costs of the action.

Solicitors for plaintiff: *Thorneycroft & Willis.*

Solicitors for defendant: *Newman, Paynter, Gould & Williams.*

(1) 13 Q. B. D. 547. F. E.

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March 6, 7.

J. C. & J. FIELD & CO., LIMITED *v.* WAGEL SYNDICATE, LIMITED.
In re TRADE MARK 96,997.

[1899 J. 1599.]

Trade-mark — Action for Infringement — Motion to Rectify — Trade-mark registered more than Five Years—Certificate of Right to Exclusive Use—"Action"—Patents, Designs, and Trade Marks Act, 1883 (46 & 47 *Vict. c.* 57), *ss.* 76, 77A, 90—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

The proprietors of a trade-mark, which had been registered for more than five years, brought an action for infringement, and the defendants moved to rectify the register by removing the plaintiffs' mark therefrom. The action and motion were tried together and on the same evidence; an injunction was granted, and the motion was refused:—

Held, that, although after the expiration of five years from the date of registration the validity of the trade-mark could only be impeached on motion under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, the right to the exclusive use of the trade-mark had come in question in the action within the meaning of s. 77A, and that the plaintiffs were entitled to a certificate to that effect.

THE plaintiffs had registered on March 31, 1890, the word "Savonol," No. 96,997 in class 47, in respect of common soaps, detergents, and soft soap. In 1899 they commenced an action to restrain the defendants from passing off any soft soap not of the plaintiffs' manufacture as or for the goods of the plaintiffs by the use of the term "Savoline," and gave notice of motion for an interim injunction. The defendants gave notice of motion to rectify the register by removing the plaintiffs' mark therefrom; and on December 1, 1899, Byrne J. made an order which had not been drawn up, but which was shewn by the indorsement on the brief of the plaintiffs' counsel to have been to the following effect: "No order on injunction motion except that costs are costs in the action. Set down the action at once. No pleadings. Set down the rectification motion to be heard with the action and on the same oral evidence. Expert witnesses of mere opinion not to exceed three on either side. Liberty to apply to advance."

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The action and motion for rectification accordingly came on before Buckley J. and were heard together, with the result that his Lordship held that "Savonol" was an invented word, and that the use of the word "Savoline" would be calculated to deceive. He therefore granted an injunction and dismissed the motion.

H. Terrell, Q.C., and *Sebastian*, for the plaintiffs in the action, then asked for a certificate under s. 77A of the Patents, Designs, and Trade Marks Act, 1883, that the right to the exclusive use of the trade-mark had come in question in the action.

[They referred to *Benjamin Edgington, Limited* v. *John Edgington & Co.* (1); *Barlow & Jones* v. *Johnson & Co.* (2); *Apollinaris Co.* v. *Snook* (3); *Pinto* v. *Badman* (4); *Paine & Co.* v. *Daniells & Sons' Breweries* (5); Sebastian on Trade Marks, 4th ed. p. 359.]

J. Cutler, Q.C., *A. J. Walter*, and *J. A. S. Bucknill*, for the defendants, pointed out that the validity of the plaintiffs' trade-mark could not be challenged in an action, inasmuch as it had been more than five years on the register: s. 76 of the Act of 1883.

BUCKLEY J. This is an action brought by Messrs. Field & Co., Limited, for the infringement of a trade-mark which was registered in March, 1890—that is to say, more than five years ago. The defendants in that action, the Wagel Syndicate, Limited, gave a cross-notice of motion to rectify the register by expunging the trade-mark. I have held that the plaintiffs in the action are entitled to succeed; and if it be open to me to do so, it seems to me that it is a case in which, so far as the facts are concerned, I ought to certify that the right to the exclusive use of the trade-mark came in question.

Sect. 18 of the Patents, Designs, and Trade Marks Act of 1888, which is made s. 77A of the Act of 1883, runs thus: "In

(1) (1889) 6 Rep. Pat. Cas. 513.
(2) (1890) 7 Rep. Pat. Cas. 395.
(3) (1890) 7 Rep. Pat. Cas. 474.
(4) (1891) 8 Rep. Pat. Cas. 181.
(5) [1893] 2 Ch. 567, 588.

an action for infringement of a registered trade-mark the Court or a judge may certify that the right to the exclusive use of the trade-mark came in question, and if the Court or a judge so certifies, then in any subsequent action for infringement the plaintiff in that action, on obtaining a final order or judgment in his favour, shall have his full costs, charges, and expenses as between solicitor and client, unless the Court or judge trying the subsequent action certifies that he ought not to have the same." If it is open to me, I am minded to give that certificate. But the question is whether the right to the exclusive use of the trade-mark has come in question "in an action."

Where there is an action for infringement and a motion to rectify the register, the question as to the right to the exclusive use of the trade-mark may come in question upon the motion and not in the action, if the two are to be divided. I have to determine whether in this case the right came in question in the action, and whether the word "action" in s. 77A means action as distinguished from motion. The trade-mark in this case has been registered more than five years, with the result that under s. 76 of the Act of 1883 the registration is conclusive evidence of the right of the registered person to the "exclusive use of the trade-mark subject to the provisions of this Act." One of the provisions of the Act is s. 90, which enables the Court, on the application of any person aggrieved, to take the mark off the register, although it has been there more than five years. In a sense, therefore, the right to the exclusive use of the trade-mark could not in this case—the mark having been registered more than five years—come in question in the action. It must have come in question on an application to rectify, and it has, I think, been held (1), that inasmuch as the jurisdiction to rectify the register under s. 90 is a statutory jurisdiction, the right to rectify must be asserted under the section on a motion, and cannot be raised in an action or by counter-claim. If, therefore, in this case I could not give a certificate, it would seem to me that in every case in which a trade-mark has been registered more than five

(1) See *Pinto* v. *Badman*, 8 Rep. Pat. Cas. 181, 190.

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years it would be impossible for the owner to get a certificate under s. 77A. That would be a conclusion so inconsistent with what obviously is the spirit of the Act, that I ought not unless compelled to do so come to that conclusion.

Now the facts here are these. The action having been brought, and the notice of motion to rectify having been given, an order was made when the motion came on, which, according to counsel's indorsement, was that the motion was to be heard with the action, and on the same oral evidence, and accordingly at the trial before me, the witnesses were called once for all both on the motion and in the action. It appears to me that under those circumstances it is competent to me to determine, and I do determine, that here the right to the exclusive use of the trade-mark came in question in an action.

I will mention what the authorities are. It appears to me that I am not bound by any decision to the contrary. The first case is a case of *Benjamin Edgington, Limited* v. *John Edgington & Co.* (1), where, there being an action and a motion to rectify, the motion was dismissed with costs—that is to say, the trade-mark was upheld—and an injunction was granted. There Kay J. refused the certificate, saying: "I cannot say that the validity has been tried in the action at all. I only make the order because Mr. Renshaw has admitted that he could not resist the action unless the trade-mark was taken off." The reason assigned by Kay J. was, therefore, that he had not tried the action at all. The action succeeded or failed according to the result of the motion, and was never tried. That case, therefore, in my opinion did not determine the point. The next case is *Barlow & Jones* v. *Johnson & Co.* (2) There all that took place was this, so far as the present point is concerned. The motion to rectify was refused and an injunction to restrain infringement was granted, and at the end Mr. Romer, as he then was, said this (3): "Your Lordship will give the plaintiffs a certificate that the trade-mark came in question. Mr. Justice Chitty—Yes." So that there was no argument upon it at all, but in point of fact Chitty J., who tried the case, did

(1) 6 Rep. Pat. Cas. 513, 518. (2) 7 Rep. Pat. Cas. 395.
(3) 7 Rep. Pat. Cas. 411.

there grant a certificate upon an action and motion to rectify. The next case is the *Apollinaris Co.* v. *Snook* (1) before Kekewich J. There there was an action and no motion, and there again, without any discussion, the learned judge gave the certificate. The next is *Pinto* v. *Badman*. (2) There there was an action and counter-claim for rectification, and Day J., before whom the action was tried, gave judgment for the plaintiff on the claim and counter-claim, and granted a certificate. The last case is *Paine & Co.* v. *Daniells & Sons' Breweries* (3), which was action and motion, and there, the case having gone to appeal, a certificate was asked for, and what Lindley L.J. said was: "I do not think it is a case for a certificate. This is a very peculiar case." The jurisdiction to grant a certificate seems to have been admitted, and the Lord Justice thought that it was not a case for making the order.

Under these circumstances I hold in this case that, the action and motion to rectify having come before the Court and been heard together upon the same evidence, I am entitled under s. 77A of the Act to grant a certificate, and I do so. I only wish to add that the order I am now making is in a sense ex parte, because the defendants in the action, the applicants on the motion, are of course not interested in the question whether the certificate be granted or not. If hereafter upon the certificate which I am now granting some future defendant is exposed, or sought to be exposed, to solicitor and client costs, it appears to me that it will be perfectly competent for him to argue that the order I have now made was made without jurisdiction and is wrong, and the question can then be determined after an argument on which both sides can be heard. I therefore grant the certificate.

Solicitors: *E. Chester; Lempriere & Co.*

(1) 7 Rep. Pat. Cas. 474. (2) 8 Rep. Pat. Cas. 181, 186.
(3) [1893] 2 Ch. 567, 588.

H. C. R.

C. A. 1900 *Jan.* 18, 19, 20; *Feb.* 19.

ALLEN *v.* GOLD REEFS OF WEST AFRICA, LIMITED.

[1897 A. 585.]

SAME *v.* SAME.

[1897 A. 977.]

Company—Articles of Association—Shareholder—Vendor's Shares—Fully Paid Shares—Unpaid Shares—Calls—Arrears—Debts—Lien of Company on Unpaid Shares—Alteration of Articles—Special Resolution—Lien on Fully Paid Shares for Arrears of Calls on Unpaid Shares—Contract—Retrospective Effect of Altered Articles—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 50—*General Meetings—Notice—Service—"Member"—Deceased Member—Legal Personal Representatives.*

A limited company by one of its articles provided that it should have a lien for all debts and liabilities of any member to the company "upon all shares (not being fully paid) held by such member."

The company, by way of purchase-money for the property acquired by it, allotted fully paid shares to Z., a nominee of the vendor to the company. Z. also applied for and had allotted to him shares not paid up. He was the only holder of fully paid-up shares. At his death he was indebted to the company in arrears of calls on the unpaid shares, but his assets were insufficient to pay the arrears. Thereupon the company, by special resolution under s. 50 of the Companies Act, 1862, altered the above article by omitting therefrom the words "not being fully paid," thus creating a lien on Z.'s fully paid shares:—

Held, by the Court of Appeal (Lindley M.R., Vaughan Williams and Romer L.JJ.), that the company had power to alter its articles by extending its lien to fully paid shares:

Held, also, by Lindley M.R. and Romer L.J. (Vaughan Williams L.J. dissenting), that the lien so extended, having been made in good faith, was enforceable against Z.'s fully paid shares, since he took them subject to the original articles and the power of altering them given to the company by s. 50 of the Act, and did not make any special or implied bargain that they should not be affected by any subsequent alteration of the articles; and that the fact of those shares being vendor's shares allotted in payment for the property purchased by the company, instead of being shares paid for in cash in the ordinary way, was immaterial.

James v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, and *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361, considered as to the "retrospective" effect of an alteration by a company of its articles.

Where, under a company's articles, notice of general meetings is to be given to "members," and such notice may be served upon any "member" either personally or by sending it prepaid by post addressed to "such

member" at his registered address, it is not necessary, in the case of a deceased member, either to send a notice addressed to him at his registered address, or to serve his legal personal representatives unless they have themselves become "members" by formal registration.

Judgment of Kekewich J., [1899] 2 Ch. 40, varied.

APPEAL from the judgment of Kekewich J. (1)

The defendant company, the Gold Reefs of West Africa, Limited, was incorporated on July 2, 1895, under the Companies Acts, 1862 to 1890. Clause 5 of the memorandum of association was as follows: "The capital of the company is 90,000*l*., divided into 360,000 shares of 5*s*. each. The said shares or any shares issued upon an increase of capital or any portion thereof respectively may be issued fully paid up, at a premium, or at par, and with such preference, privileges or priority over or postponement to the remaining or any other shares of the company in respect of dividends or otherwise as may be determined." The memorandum was accompanied by articles of association, which provided (art. 2) that the word "member" should mean a registered holder of any share or stock of the company; (art. 22) that if any "member" failed to pay any call, instalment, or interest, the directors might serve a notice on such "member" requiring him to pay the same, together with further interest from the date of the notice, and all expenses incurred by the company through such non-payment; (art. 23) that the notice should name a day on which such call, instalment, or interest was to be paid, and also state that in the event of non-payment the shares in respect of which the call was made or the instalment was payable would be liable to be forfeited; (art. 24) that if the requisitions of the notice were not complied with, any share in respect of which such notice had been given might be forfeited by a resolution of the directors to that effect; (art. 25) that any share so forfeited should be deemed to be the property of the company, and might be disposed of as the directors thought fit; (art. 26) that any member whose shares had been forfeited should, notwithstanding, be liable to pay and should forthwith pay to the company all calls, instalments, interest, and expenses

(1) [1899] 2 Ch. 40.

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owing upon or in respect of such shares at the time of the forfeiture, together with interest thereon from the time of forfeiture until payment, in the same manner as if the shares had not been forfeited, and to satisfy all (if any) the claims and demands which the company might have enforced in respect of the shares at the time of forfeiture, without any deduction or allowance for the value of the shares at the time of forfeiture; (art. 27) that the forfeiture of a share should involve the extinction at the time of forfeiture of all interest in and all claims and demands against the company in respect of the share, and all other rights and liabilities incidental to the share as between the shareholder and the company, except only such rights and liabilities as were by the articles expressly saved, or as were by the statutes given or imposed in the case of past members; (art. 28) that a record in the minute-book of the company of the forfeiture of a share should be conclusive evidence as against all persons claiming to be entitled to the share as forfeited; (art. 29) "that the company shall have a first and paramount lien for all debts, obligations, and liabilities of any member to or towards the company upon all shares (not being fully paid) held by such member. . . . Provided always that if the company shall register, or agree to register, any transfer of any share upon which it has such lien as aforesaid without giving to the transferee notice of its claim, the said share shall be freed and discharged from the lien of the company"; (art. 30) that the directors might serve upon any member who was indebted or under obligation to the company a notice requiring him to pay the amount due to the company, or satisfy the said obligation, and stating that if payment were not made, or the obligation satisfied, within a time (not less than fourteen days) specified in such notice, the share held by such member would be liable to be sold; and that if such member should not comply with such notice, the directors might sell such share without further notice; (art. 38) that the directors might, in their discretion, refuse to register the transfer of any shares upon which the company had a lien, and in case the shares proposed to be transferred should be not fully paid up might decline to register a transfer of the same to any person not in

their opinion a responsible person; (art. 41) that "the executors or administrators of a deceased member (not being one of several joint holders) shall be the only persons recognised by the company as having any title to the shares registered in the name of such member. . . ."; (art. 42) that any person becoming entitled to a share in consequence of the death of any member might elect either to be registered himself as a holder, or to have some person nominated by him registered as a transferee thereof; (art. 45) that a person so becoming entitled should, subject to any lien of the company, be entitled to receive dividends, bonuses, or other moneys payable in respect of the share, but should not be entitled to receive notices of, or to attend or vote at meetings of the company, or, save as aforesaid, to any of the rights or privileges of the members, unless and until he should have become a member in respect of the shares; (art. 74) that notice of general meetings should be given to such members as were, under the provisions therein contained, entitled to receive notices; but the accidental omission to give such notice to, or the non-receipt of such notice by, any member, should not invalidate any resolution passed at any such meeting; (art. 88) that no member should be entitled to be present or vote at any meeting unless he had paid all calls and other moneys due from him to the company; and (art. 170) that "a notice may be served by the company upon any member either personally, or by sending it prepaid by post addressed to such member at his registered address as appearing in the register of the members of the company." The articles contained no special provision for service of notices in the case of a deceased member. With reference to art. 29, it seems that a lien on fully paid-up shares of a company, or the possibility of such a lien, renders them unquotable on the Stock Exchange.

Shares, both fully paid up and not fully paid up, were issued by the company. One Emilio Zuccani, as the nominee of the vendor to the company, had a number of fully paid-up shares allotted to him by way of purchase-money for the property acquired by the company under their memorandum of association, and he held 27,885 of these shares at the time of his

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death, these shares being his own property. It did not appear that when Zuccani took these shares he entered into any special bargain conferring upon him any special rights in respect of them.

In addition to these fully paid-up shares, Zuccani applied for and had allotted to him 60,000 ordinary 5*s.* shares, not paid up. These were applied for and allotted on the terms of the company's prospectus (on which no question turned) and articles of association. Calls were from time to time made in Zuccani's lifetime on these unpaid-up shares, but he did not pay the calls when they became due, and as early as May, 1896, and thenceforward during his life letters were sent to him pressing for payment of his arrears. Although he did not pay his calls, he constantly paid up quantities of shares in full before their amounts had been called up: in other words, he from time to time not only paid all the calls due on some of his shares, but also prepaid the uncalled-up amounts of the same shares. He did this constantly all through 1896, and in that way he was able to sell and transfer the shares so paid up free from all liability to calls and from all lien in favour of the company. From the money so obtained by him he made remittances to the company on account of his calls in arrear. His object in fully paying up batches of these shares in the way described was to obtain shares which he could put on the market free from all claims and demands by the company. This, it appeared, the directors allowed him to do as a favour or accommodation to him. All the shares thus paid up were transferred by him in his lifetime; he did not hold any of them at the time of his death.

Zuccani died on February 4, 1897, leaving a will which was proved by the plaintiffs, his executors.

At the time of his death he was the registered holder of the 27,885 fully paid-up vendor's shares, and also of 36,435 other shares partly paid up, and he owed the company 6072*l.* 10*s.* for calls in respect of these, besides interest to a considerable amount.

The plaintiffs did not get themselves registered as members of the company in respect of any of Zuccani's shares, and they

had not sufficient assets to answer his liabilities. Steps were taken to have his estate administered in the Chancery Division, but the company, instead of electing to carry in a proof for its debt, proceeded to take more summary measures for recovering it.

In the first place, on February 9, 1897, a notice was sent out of an extraordinary general meeting of the company to be held on February 18, for the purpose of passing a special resolution to alter art. 29 of the articles of association (being the article giving a lien for all debts, &c., upon shares "not being fully paid") by omitting the words "not being fully paid." This notice was posted to Zuccani at his registered address, although the directors were then aware of his death. The meeting was held on February 18, and the special resolution was then passed. Thereupon notice of a confirmatory meeting to be held on March 8 was, as before, sent to Zuccani's registered address. Both notices, addressed to Zuccani personally, came to the knowledge of the plaintiffs, his executors. On March 8 the confirmatory meeting was held and the resolution confirmed. Thus the company claimed to extend their lien to all fully paid-up shares. There were in fact no fully paid-up shares except those belonging to Zuccani.

The next step the company took was this. On June 4, 1897, the directors, purporting to act under arts. 22, 23, and 24, posted to Zuccani at his registered address a notice requiring payment by June 21 of the 6072*l.* 10*s.* due for calls on the 36,435 shares, a sum of 804*l.* 6*s.* 11*d.* for interest on arrears of calls, and further interest from the date of the notice; the notice also stating that in the event of non-payment by the time appointed those shares would be liable to be forfeited. This notice was sent also to the plaintiffs, Zuccani's executors, who had not then lodged the probate of his will with the company for registration. The amounts demanded were not paid, and on June 23 the directors passed a resolution purporting to forfeit the 36,435 partly paid-up shares.

On January 29, 1897, the directors had refused to register a transfer of some of Zuccani's fully paid-up shares, but ultimately, finding that the articles gave no power to the company or its

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directors to refuse to register a transfer of fully paid-up shares, they passed the transfer.

The object of the plaintiffs in bringing these consolidated actions was to obtain a declaration that the defendant company had no lien upon the fully paid-up shares, and an injunction to restrain the forfeiture of the partly paid-up shares.

At the trial of the actions Kekewich J. held, as already reported (1), (1.) that the notice threatening forfeiture was bad upon the grounds (among others) that, as the company or its directors were aware of Zuccani's death at the time they served the notice by registered letter addressed to him at his registered address, this service was not sufficient to bind his estate, and that the service of the notice upon his executors was also ineffectual, an executor of a deceased member of a company not being a "member," unless duly registered as such; and (2.) that the notices of the meeting of the company to pass the resolution altering art. 29 were also ineffectual as having been addressed to Zuccani after the directors had become aware of his death. His Lordship therefore considered it unnecessary to decide the further question whether the company could alter its articles so as to create a lien upon Zuccani's fully paid-up shares. His Lordship accordingly gave judgment granting an injunction restraining the defendant company from enforcing the lien.

From that judgment the company appealed. The appeal was heard on January 18, 19, 20, 1900.

Their Lordships held that owing to mistakes on the part of the company there had been no effective forfeiture of the unpaid-up shares, and on that point affirmed the judgment of the Court below. The main question on which the case is now reported was whether the company had power to alter its original articles by giving itself a lien upon Zuccani's fully paid-up shares; and there was also the minor question as to the validity of the notices sent to Zuccani's registered address of the meetings of February 18 and March 8, at which the special resolution altering the articles was passed and confirmed.

(1) [1899] 2 Ch. 40.

Warrington, Q.C., and *Dunham*, for the defendant company. First, there was no irregularity in the proceedings for passing and confirming the resolution altering art. 29. Zuccani the "member" being dead, sending a notice to his registered address was merely superfluous; and art. 45 dispenses with the necessity of serving the executors of any deceased member with notice. The proceedings for passing the resolution being then perfectly regular, the next and most important question is whether the company could by special resolution alter its articles so as to impose a lien upon Zuccani's fully paid-up shares. The articles of a company constitute a contract as between a company and each member of it: Companies Act, 1862 (25 & 26 Vict. c. 89), s. 16. Under s. 50 (1) a company may at any time alter its articles, and a member, by virtue of his contract, takes his shares subject to that right. The present question as affecting the powers of a company has not been actually decided in any reported case, but in the case of a building society it has been held that such a society can divest the previously existing rights of a member by altering its articles: *Pepe* v. *City and Suburban Permanent Building Society* (2); and we submit that in principle that case covers the present.

[ROMER L.J. Can you alter articles so as to affect past transactions?]

We do not propose to alter the relation of debtor and creditor as between Zuccani and the company: quâ debtor, his position remains the same as before; all that happens is that, quâ

(1) Sect. 50 is as follows: "Subject to the provisions of this Act, and to the conditions contained in the memorandum of association, any company formed under this Act may, in general meeting, from time to time, by passing a special resolution in manner hereinafter mentioned"—i.e. in s. 51—"alter all or any of the regulations of the company contained in the articles of association or in the table marked A in the first schedule, where such table is applicable to the company, or make new regulations to the exclusion of or in addition to all or any of the regulations of the company; and any regulations so made by special resolution shall be deemed to be regulations of the company of the same validity as if they had been originally contained in the articles of association, and shall be subject in like manner to be altered or modified by any subsequent special resolution."

(2) [1893] 2 Ch. 311.

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holder of fully paid shares, we seek to impose a certain liability upon his holding.

[ROMER L.J. In *Menier* v. *Hooper's Telegraph Works* (1) it was held that, where the majority of a company propose to benefit themselves at the expense of the minority, the Court may interfere to protect the minority.]

In that case the majority were proposing to put a large sum into their pockets in fraud of the minority; that is not the case here.

[LINDLEY M.R. In *Andrews* v. *Gas Meter Co.* (2) it was held that the constitution of a company could be altered by special resolution under the powers conferred by ss. 50 and 51 of the Companies Act, 1862.]

Suppose a company, instead of having articles of association, started with Table A, under the power contained in s. 15, it would have the power of altering those statutory articles under the statutory provision.

[VAUGHAN WILLIAMS L.J. Do you say that, if a company adopts the provisions of Table A, it could afterwards alter them so as to alter accrued rights?]

Yes; for the contract made by the shareholder with the company is that the regulations of the company may be altered in accordance with the statutory provision. Under Table A, clause 10, the company may decline to register any transfer of shares made by a member who is indebted to them; and clause 75 empowers the directors to deduct from the dividends payable to any member all debts due to the company for calls or otherwise. That clause, though not providing for lien in terms, has that effect. Therefore Table A does contemplate giving the company certain rights as against its members who may be indebted to it; and what is included in the statutory Table A is surely a proper subject for articles of association. If by Table A, or by the original articles of association, the company can give itself a charge on the shares of its members, it can, by special resolution under s. 50, alter its regulations so as, if necessary, to give itself that right. In other words, a

(1) (1874) L. R. 9 Ch. 350. (2) [1897] 1 Ch. 361, 368.

company can by its new articles do what it could have validly done by its original articles.

[VAUGHAN WILLIAMS L.J. But the new articles do not take effect as from the date of the incorporation of the company.]

We do not say that the new articles are to have any retrospective effect so as to affect the validity or invalidity of what has been done in past years. They have no more retrospective effect than they had in *Andrews* v. *Gas Meter Co.* (1), though it may be said that there is nothing in the Act to prevent their having a retrospective effect. An alteration of the articles cannot be capricious or arbitrary, for all the shareholders affected have the opportunity of being present and discussing and voting on the resolution for that purpose.

Renshaw, Q.C., and *Kerly*, for the plaintiffs. First, we submit that this resolution creating a lien upon Zuccani's fully paid-up shares was an oppressive act as against him, he being the only holder of fully paid-up shares in the company. Secondly, we contend that a company cannot, by resolution under s. 50, do any act retrospectively affecting the rights of any shareholder, nor can such a resolution operate upon the general body of shareholders unequally. Now it is absurd to say that all the shareholders here have been dealt with on an equality. In *Andrews* v. *Gas Meter Co.* (1) all the members of the company were dealt with alike—there was equal treatment. To say that the articles can be altered because the contract to which the shareholder is a party is that the articles may be altered, is begging the question. The authorities shew that a resolution altering the regulations of a company cannot retrospectively affect existing rights: Buckley on Companies, 7th ed. p. 206; per Rigby L.J. in *James* v. *Buena Ventura Nitrate Grounds Syndicate* (2); *Swabey* v. *Port Darwin Gold Mining Co.* (3) The same principle is applied in the construction of statutes: Maxwell on the Interpretation of Statutes, 3rd ed. p. 298. *Pepe* v. *City and Suburban Permanent Building Society* (4) was a building society case, and there is a distinction

(1) [1897] 1 Ch. 361.
(2) [1896] 1 Ch. 456, 466.
(3) (1889) 1 Megone, 385.
(4) [1893] 2 Ch. 311.

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between such a case and the present. A building society is a mutual trading concern; its members are not merely a corporation, but are persons carrying on business with each other through the society upon certain rules governing their rights in their relations to each other. By s. 16 of the Building Societies Act, 1874 (37 & 38 Vict. c. 42), the contract which a member of a building society is to enter into is required to be set out in the rules of the society, and the rules are to state the manner of altering or rescinding the rules. Then s. 17 requires copies of the rules—which include the power of alteration—to be sent to the registrar, who, if he finds that the rules comply with s. 16, is to register them; and by s. 18 any alteration is to be certified by him. Thus the parties enter into the contract well knowing that the rules may be altered—a circumstance which makes a great difference between a building society and a company. Then, even to the power of a building society to alter its rules there must be a limit, in that the alteration must not be directed against an individual member: all the members must be affected equally: *Strohmenger* v. *Borough of Finsbury Permanent Investment Building Society* (1); so that even in the case of a building society an alteration of the rules may be bad through being inequitable as between the members. This is illustrated by *Sixth West Kent Mutual Building Society* v. *Shove* (2); and it is on that ground that *Pepe* v. *City and Suburban Permanent Building Society* (3) can stand. That case does not affect our contention that there must be equality among the members of the company.

Again, we charge the company with bad faith in passing this resolution for an alteration of the articles which was intended to operate as against a single shareholder. The majority of shareholders in a company cannot appropriate to themselves the advantages of having the shares of a single shareholder or of a minority of the shareholders tied up for their own benefit and at their own discretion. Here, but for this alteration, Zuccani's paid-up shares might have been sold, and with the proceeds his partly paid shares might have been

(1) [1897] 2 Ch. 469, 480. (2) (1895) [1899] 2 Ch. 64, n.
(3) [1893] 2 Ch. 311.

fully paid up. If he had been alive to vote on that resolution, it would not have been passed. Why was the notice of the meeting to pass the resolution delayed until immediately after his death? Because those who fathered it thought this would result in an advantage to themselves. It was in fact an attempt by a majority of partners to do a particular act without consulting the others—a proceeding which was disapproved by Lord Eldon in *Const* v. *Harris*. (1)

Warrington, Q.C., in reply. As to the argument that if Zuccani had been living the resolution would not have been passed, he would, through being indebted to the company, have been precluded from being present at the meeting by art. 88.

With regard to the resolution itself, I admit that the alteration in the articles was expressly intended to enable the company to recover from Zuccani a large sum of money which he could not otherwise pay, although the company had been repeatedly pressing him.

[ROMER L.J. I do not see that the directors were to be blamed for doing their best to recover for the company this very large sum of money.]

They were doing what, if the law allowed them to do it, would enable them to recover this money. Does then the law allow a company to alter its articles by imposing a lien on its fully paid-up shares? Take the case by steps. In the first place, by s. 14 of the Companies Act, 1862, a company may adopt and register articles of association. Then, by s. 15, if no articles are registered, Table A is to constitute the regulations of the company. Now Table A contains several provisions, such as clauses 10 and 75, giving a company certain rights as against shareholders who are indebted to it and so enabling it to control their interests in their shares. A company can undoubtedly create a lien on its shares by its original articles: Buckley on Companies, 7th ed. p. 97; *Bradford Banking Co.* v. *Briggs* (2); *Bank of Africa* v. *Salisbury Gold Mining Co.* (3) If, then, a company has power to create a lien by its original articles, surely it has power to do so by special resolution under

(1) (1824) T. & R. 496, 525; 24 R. R. 108.

(2) (1886) 12 App. Cas. 29.

(3) [1892] A. C. 281.

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s. 50. What is the effect of a company's articles of association? Sect. 16 of the Act says that "when registered, they shall bind the company and the members thereof to the same extent as if each member had subscribed his name and affixed his seal thereto, and there were in such articles contained a covenant on the part of himself, his heirs, executors, and administrators, to conform to all the regulations contained in such articles, subject to the provisions of this Act."

Then the next step is to s. 50, under which it is clearly competent to the company to alter its original articles in any way, and there is nothing there excluding the power of altering them by creating a lien on any of the shares. The section goes on to provide expressly that the new regulations shall have "the same validity as if they had been originally contained in the articles of association." It is thus part of the contract entered into by any shareholder that the articles may be altered and that any new articles shall be of the same validity as if they had formed part of the original articles.

[VAUGHAN WILLIAMS L.J. The section only says that the new articles shall have "the same validity" as the original articles, not "the same effect."]

The section means that the company can by any new articles do that which it could have validly done by its original articles; and the creation of a lien upon any of its shares, whether paid up or not, by its original articles is clearly valid, as appears from the two cases in the House of Lords I have already cited. I concede that the shareholder on taking his shares might make a special bargain that the articles should not be altered so as to affect his shares, and that the company could not thereafter do anything affecting that special contract; but here there was no special contract outside the articles.

[VAUGHAN WILLIAMS L.J. Suppose the original articles provided for the priorities of different classes of shares: could that afterwards be altered by special resolution under s. 50?]

I am not satisfied that such a thing could not be done by special resolution.

[VAUGHAN WILLIAMS L.J. Surely, if the original articles constitute the materials for a binding contract, the company

has lost its power of altering the articles in such a manner as to alter that contract.

ROMER L.J. The company has held out by its articles that if you pay up your shares in full you shall have special privileges. Can the company after that take those privileges away?]

Here Zuccani was a vendor taking fully paid-up shares as purchase-money, knowing, as he must be taken to have known, that the company might afterwards alter its articles so as to apply to all fully paid-up shares, including his own. The resolution altering the articles is not really retrospective: it is in a sense, because it alters the shareholder's original position; but it takes effect only from the time it is passed.

As to the alleged distinction between building society cases and company cases, for the purpose of applying legal principles no true distinction can be drawn. There is practically no difference between the two classes of cases.

LINDLEY M.R. This is an important case, and requires consideration.

Cur. adv. vult.

Feb. 19. LINDLEY M.R. This is an appeal from a judgment of Kekewich J. granting an injunction restraining the defendants from enforcing a lien on some fully paid-up shares in the company and belonging to a deceased shareholder named Zuccani. The appeal is not only important to the parties to it, but it raises several questions of great general interest relating to the power of limited companies to alter their articles, and especially to their power to alter their articles so as to affect shares standing in the names of deceased shareholders, and to the effect of an alteration duly made on vendors' fully paid-up shares issued before the alteration is made.

The facts are as follows: [His Lordship then stated the facts leading up to the steps for passing the special resolution, and referred to the memorandum and articles of association as above set out. He observed that the lien conferred by art. 29 clearly extended to all Zuccani's unpaid shares, and did not cease on his death, but continued to be as available against

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his executors (though not themselves members) as it had been against him in his lifetime; as, independently of any article, a lien on property did not cease on the death of the owner of the property. So far, therefore, as Zuccani's unpaid-up shares were concerned, his Lordship held that the company was entitled to the lien and power of sale conferred by arts. 29 and 30 —a right that had not in fact been disputed. His Lordship then proceeded:—]

The directors, however, desired to extend the lien and power of sale and power to refuse to register transfers to Zuccani's fully paid-up shares. I say, to his shares, for he was the only person entitled to fully paid-up shares from whom any calls were due. Accordingly steps were taken to pass a special resolution to alter art. 29 by striking out the words "not being fully paid," and a resolution to that effect was passed on February 18, 1897, and was confirmed on March 8, 1897. Notice convening these meetings was sent addressed to Zuccani at his registered place of address; and the notice came to the knowledge of his executors. The directors knew that he was dead; but I cannot agree with the learned judge that the resolution is invalid by reason of any defect in the notice. Notices of meetings have only to be given to members, and the executors were not members. If no notice at all had been sent to the executors or to Zuccani's registered address, the omission would not, in my opinion, have affected the propriety of holding the meetings or the validity of the resolutions passed at them. Art. 45 expressly provided that notices of meetings need not be sent to executors who had not become members. To hold that meetings of companies could not be properly held unless the notices convening them were given to the unregistered legal personal representatives of all deceased members would be to paralyze the transaction of business, and would be contrary to the ordinary principles applicable to corporate bodies and, indeed, to other associations as well. The regularity of the proceedings to alter the articles by no means, however, disposes of the matters in controversy between the parties.

The facts above stated raise the following very important questions, namely, (1.) Whether a limited company, registered

with articles conferring no lien on its fully paid-up shares, can by special resolution alter those articles by imposing a lien on such shares? (2.) Whether, if it can, the lien so imposed can be made to apply to debts owing by fully paid-up shareholders to the company at the time of the alteration of the articles? (3.) Whether, if it can, fully paid-up shares allotted to vendors of property to the company are in any different position from other fully paid-up shares issued by the company? (4.) Whether, assuming the altered articles to be valid and to be binding on the general body of the holders of fully paid-up shares in the company, there are any special circumstances in this particular case to exclude the fully paid-up shares held by Zuccani from the operation of the altered articles?

The articles of a company prescribe the regulations binding on its members: Companies Act, 1862, s. 14. They have the effect of a contract (see s. 16); but the exact nature of this contract is even now very difficult to define. Be its nature what it may, the company is empowered by the statute to alter the regulations contained in its articles from time to time by special resolutions (ss. 50 and 51); and any regulation or article purporting to deprive the company of this power is invalid on the ground that it is contrary to the statute: *Walker* v. *London Tramways Co.* (1)

The power thus conferred on companies to alter the regulations contained in their articles is limited only by the provisions contained in the statute and the conditions contained in the company's memorandum of association. Wide, however, as the language of s. 50 is, the power conferred by it must, like all other powers, be exercised subject to those general principles of law and equity which are applicable to all powers conferred on majorities and enabling them to bind minorities. It must be exercised, not only in the manner required by law, but also bonâ fide for the benefit of the company as a whole, and it must not be exceeded. These conditions are always implied, and are seldom, if ever, expressed. But if they are complied with I can discover no ground for judicially putting any other restrictions on the power conferred by the section than those

(1) (1879) 12 Ch. D. 705.

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contained in it. How shares shall be transferred, and whether the company shall have any lien on them, are clearly matters of regulation properly prescribed by a company's articles of association. This is shewn by Table A in the schedule to the Companies Act, 1862, clauses 8, 9, 10. Speaking, therefore, generally, and without reference to any particular case, the section clearly authorizes a limited company, formed with articles which confer no lien on fully paid-up shares, and which allow them to be transferred without any fetter, to alter those articles by special resolution, and to impose a lien and restrictions on the registry of transfers of those shares by members indebted to the company.

But then comes the question whether this can be done so as to impose a lien or restriction in respect of a debt contracted before and existing at the time when the articles are altered. Again, speaking generally, I am of opinion that the articles can be so altered, and that, if they are altered bonâ fide for the benefit of the company, they will be valid and binding as altered on the existing holders of paid-up shares, whether such holders are indebted or not indebted to the company when the alteration is made. But, as will be seen presently, it does not by any means follow that the altered article may not be inapplicable to some particular fully paid-up shareholder. He may have special rights against the company, which do not invalidate the resolution to alter the articles, but which may exempt him from the operation of the articles as altered.

The conclusion thus arrived at is based on the language of s. 50, which, as I have said already, the Court, in my opinion, is not at liberty to restrict. This conclusion, moreover, is in conformity with such authorities as there are on the subject. *Andrews* v. *Gas Meter Co.* (1) is an authority that, under s. 50 of the Companies Act, 1862, a company's articles can be altered so as to authorize the issue of preference shares taking priority over existing shares, although no power to issue preference shares was conferred by the memorandum of association or by the original articles. The answer to the argument that the company could not alter existing rights is that, within the

(1) [1897] 1 Ch. 361.

limits set by the statute and the memorandum of association, the rights of shareholders in limited companies, so far as they depend only on the regulations of the company, are subject to alteration by s. 50 of the Act.

The decision of the late Lord Justice Chitty in *Pepe* v. *City and Suburban Permanent Building Society* (1) is, in principle, also closely in point. A member of a building society, who had given notice of withdrawal, and who by the rules, as they then stood, became entitled to a certain sum of money, was held to be deprived of his right to that sum by an alteration made in the rules before he had ceased to be a member. This case went very far, but it has been treated as correct in *Botten* v. *City and Suburban Permanent Building Society*. (2)

It was urged that a company's articles could not be altered retrospectively, and reliance was placed on Rigby L.J.'s observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate*. (3) The word "retrospective" is, however, somewhat ambiguous, and the concurrence of Rigby L.J. in *Andrews* v. *Gas Meter Co.* (4) shews that his observations in *James* v. *Buena Ventura Nitrate Grounds Syndicate* (3) are no authority for saying that existing rights, founded and dependent on alterable articles, cannot be affected by their alteration. Such rights are in truth limited as to their duration by the duration of the articles which confer them.

But, although the regulations contained in a company's articles of association are revocable by special resolution, a special contract may be made with the company in the terms of or embodying one or more of the articles, and the question will then arise whether an alteration of the articles so embodied is consistent or inconsistent with the real bargain between the parties. A company cannot break its contracts by altering its articles, but, when dealing with contracts referring to revocable articles, and especially with contracts between a member of the company and the company respecting his shares, care must be taken not to assume that the contract involves as one of its terms an article which is not to be altered.

(1) [1893] 2 Ch. 311.
(2) [1895] 2 Ch. 441.
(3) [1896] 1 Ch. 466.
(4) [1897] 1 Ch. 361.

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It is easy to imagine cases in which even a member of a company may acquire by contract or otherwise special rights against the company, which exclude him from the operation of a subsequently altered article. Such a case arose in *Swabey* v. *Port Darwin Gold Mining Co.* (1), where it was held that directors, who had earned fees payable under a company's articles, could not be deprived of them by a subsequent alteration of the articles, which reduced the fees payable to directors.

I take it to be clear that an application for an allotment of shares on the terms of the company's articles does not exclude the power to alter them nor the application of them, when altered, to the shares so applied for and allotted. To exclude that power or the application of an altered article to particular shares, some clear and distinct agreement for that exclusion must be shewn, or some circumstances must be proved conferring a legal or equitable right on the shareholder to be treated by the company differently from the other shareholders.

This brings me to the last question which has to be considered, namely, whether there is in this case any contract or other circumstance which excludes the application of the altered article to Zuccani's fully paid-up vendor's shares.

First, let us consider the shares. I am unable to discover any difference in principle between one fully paid-up share and another. Whether a share is paid for in cash or is given in payment for property acquired by the company appears to me quite immaterial for the present purpose. In either case the shareholder pays for his share, and in either case he takes it subject to the articles of association and power of altering them, unless this inference is excluded by special circumstances.

Next let us consider whether a vendor who makes no special bargain except that he is to be paid in fully paid-up shares is in any different position from other allottees of fully paid-up shares. I fail to see that he is, unless he stipulates that his shares shall be specially favoured. Zuccani bargained for fully paid-up shares and he got them. The imposition of a lien on them did not render them less fully paid-up than they were before. They remained what they were. Zuccani did not

(1) 1 Megone, 385.

bargain that the regulations relating to paid-up shares should never be altered, or that, if altered, his shares should be treated differently from other fully paid-up shares. I cannot see that the company broke its bargain with him in any way by altering its regulations or by enforcing the altered regulations as it did. I have already drawn attention to clause 5 of the memorandum of association. Having regard to its plain language no allottee of shares, whether a vendor or an ordinary applicant, can justly complain of injustice or even hardship if his rights under the original articles are modified to his disadvantage. Every allottee was told by the memorandum that his rights as a shareholder were subject to alteration, and no allottee acquired any rights except on these terms unless, of course, some special bargain was made with him. If Zuccani had not been indebted to the company, could he have successfully maintained that the company had no power to alter the articles and so make his shares liable to a lien and consequently less marketable than before? I take it that it is clear that he could not. But I arrive at this conclusion only because the bargain with him has not been broken. Zuccani's indebtedness to the company confers on him, or his executors, no rights against it. But it is his indebtedness which creates the embarrassment from which they seek to escape. The fact that Zuccani's executors were the only persons practically affected at the time by the alterations made in the articles excites suspicion as to the bona fides of the company. But, although the executors were the only persons who were actually affected at the time, that was because Zuccani was the only holder of paid-up shares who at the time was in arrear of calls. The altered articles applied to all holders of fully paid shares, and made no distinction between them. The directors cannot be charged with bad faith.

After carefully considering the whole case, and endeavouring in vain to discover grounds for holding that there was some special bargain differentiating Zuccani's shares from others, I have come to the conclusion that the appeal from the decision of the learned judge, so far as it relates to the lien created by the altered articles, must be allowed. His decision as to the

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forfeiture having, however, been affirmed, each party should be left to pay his own costs.

VAUGHAN WILLIAMS L.J. I do not know that I differ from my brethren as to the law of this case. We are all agreed that there was power in the shareholders to pass the resolution which they did pass. There is no question as to the abstract validity of the resolution. It falls within the powers of alteration conferred by s. 50 of the Companies Act, 1862.

We are further all agreed that a company cannot contract itself out of the statutory power of alteration conferred by s. 50; and the alteration of the articles in the present case involves no contravention of the memorandum of association. But I think that we are all agreed that cases might occur in which a member might have acquired, by contract or otherwise, special rights against the company which would exclude him from the operation of the altered article. It is in this sense that I understand the observation of Rigby L.J. in *James* v. *Buena Ventura Nitrate Grounds Syndicate*. (1) A resolution may alter the regulations of a company but cannot retrospectively affect existing rights. I also take it to be clear that the alteration must be made in good faith; and I take it that an alteration in the articles which involved oppression of one shareholder would not be made in good faith.

The result is that we have to consider in the present case whether the alteration, if enforced against Zuccani's executors, would defeat existing rights or operate oppressively. On this point I confess that I have much more doubt than my brethren seem to have. It is of course true that Zuccani, when he took these shares as the price of the property which he was selling, knew or must be taken to have known of the statutory power of alteration; but it does not seem to me that it follows that the company could make alterations which would alter the value, according to the articles in force, of the consideration which they were giving for the property purchased. For instance, I doubt very much whether, in a case in which the articles provided (as they might well do) for the issue of

(1) [1896] 1 Ch. 456, 466.

ordinary and preference shares, and the memorandum of association contained a clause in the terms of clause 5 of the present memorandum, a company, who had bought a property by the issue of fully paid preference shares could afterwards, by altering the articles, issue pre-preference shares and thus reduce the value of the consideration which they had agreed to give. It is impossible to suppose that the parties to such contract of sale and purchase could have contemplated the value of the consideration shifting from time to time at the will of the purchasers.

Griffith v. *Paget* (1), which was decided prior to *Andrews* v. *Gas Meter Co.* (2), is an authority that in the absence of express power in the memorandum such a thing could not be done. This, of course, is not the present case. The present case is that the company by the articles then in force reserved to themselves a lien upon all shares not being fully paid, and then purchased a property by the issue of fully paid shares; and the question is whether they could, on the very day after the contract, it might be, materially affect the consideration given by passing a resolution that the fully paid shares thus given as a price should be subject to a lien for all debts, obligations and liabilities of the vendor to the company, whether such debts, obligations and liabilities should have actually arrived or not, and thus render the shares unmarketable. I think not. I think that, notwithstanding the statutory powers of alteration, the basis of the contract of purchase was that the property should be paid for in marketable shares. I think that the very object of the exception in art. 29 of fully paid shares from lien was to render those shares marketable, and, as they chose to pay for the property in shares thus made marketable, I think that to allow the company to subject the vendor's shares to a lien would be to make the alteration of the articles retrospectively affect existing rights. I think, moreover, that the resolution was not passed in good faith, being really passed merely to defeat the existing rights of an individual shareholder.

My observations have no bearing on shares fully paid up in

(1) (1877) 5 Ch. D. 894. (2) [1897] 1 Ch. 361.

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pursuance of calls in the ordinary way; but it is worthy of observation that Zuccani did, in respect of shares other than vendor's shares, prepay such shares with the assent of the company for the purpose of freeing those shares from lien. I doubt if the company could have subjected these shares to lien after receiving prepayment.

ROMER L.J. For the reasons given by the Master of the Rolls in his judgment, I agree with him that there was no defect in the resolutions altering the articles of the company as to lien on the ground of absence of notice to Mr. Zuccani or his representatives, and I have nothing to add to what the Master of the Rolls has said on this head.

I also agree with him in the conclusions he has come to on the other points taken by the respondents on this appeal; but, having regard to the importance of some of the arguments addressed to us, I think it right to give my reasons for arriving at those conclusions.

A company such as this may undoubtedly by its articles of association provide for a lien on the shares of its shareholders in respect of any debts for the time being due from them to the company, and, if the original articles do not provide for the lien, the company may subsequently, by duly altering its articles, give itself such a lien; and the fact that the original articles did not provide for a lien would be in itself no ground justifying a shareholder who was indebted when the articles were altered in saying that he contracted the debt or that he took his shares in reliance on there being no lien, and that the new articles must not operate so as to make the lien thereby given extend to his existing debt. A shareholder must be taken to have known that the articles might be so altered as to give the lien. And certainly a shareholder could not say as against the company that he was entitled to special rights because he did not pay his debts. And the same considerations apply to the case where the original articles give only a limited lien, as, for example, a lien limited to debts due for unpaid calls. The company might by subsequent articles extend the lien, and a shareholder would have no right to object to

the extended lien because he happened to be indebted to the company.

Of course, by the above observations I have not been dealing with exceptional cases. I can imagine a case, for example, where by the memorandum of association certain provisions as to lien are made part of the constitution of the company which could not be affected by any alteration of the articles. And special contracts might be made with particular classes of shareholders or individuals, or special obligations to them might be incurred by the company, and that even by virtue of the original articles alone, which would prevent the articles being altered as against them, or prevent the alterations being enforceable against them. But, putting aside such exceptional cases, the observations I have made as to the general law are in my opinion sound.

I will now consider the circumstances of the case before us. And the first question is as to the meaning and effect of art. 29 of the company. In my opinion that article merely provides for a limited lien—that is to say, it limits the lien so as to exclude fully paid-up shares. There is nothing in the memorandum of association of the company to prevent that lien being subsequently extended to fully paid-up shares by an alteration in the articles. There is nothing in the company's original articles of association to prevent such extension of the lien. Nor was any shareholder justified in assuming from art. 29 that fully paid-up shares would never be made subject to the lien by an alteration in the articles. That article only in substance stated that the lien thereby given did not extend to fully paid-up shares. No one was justified in assuming from it that the company thereby held out, in favour of any person acquiring fully paid-up shares, that those shares should never be made subject to a lien by an alteration of the articles. If art. 29 had gone on to state expressly that the lien thereby provided might be extended later on by an alteration of the articles, no one could venture to doubt what was the true meaning and effect of the article. But such a statement is implied though not expressed. It was not, in my opinion, necessary for the article to say at the end, "Caution—remember

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the power of the company to alter its articles by extending its lien," or any words to that effect.

But then it is said that, though holders of shares paid up in the ordinary way by calls could not complain of an alteration of the articles, yet the holders of other paid-up shares stand in a different position, though they were not the subject of any special contract as to lien. I cannot think this contention sound. Putting aside for the moment, as we are doing, any case of a special bargain with the company, in my opinion no shareholder was justified in assuming from art. 29 that if he obtained by allotment fully paid-up shares, or subsequently paid-up ordinary shares in full in advance of calls, those shares should be specially distinguished from shares subsequently paid up in full by ordinary calls, or give him special rights so as to prevent the company from altering the articles and extending the lien to fully paid-up shares, or so that he would be able to say that such an alteration of the articles, if made, could not be enforced as against his shares. I find nothing in art. 29 to deprive the company of its right, by altering its articles, to extend its lien to fully paid-up shares generally, or to limit that right to shares paid up by ordinary calls. Still less, in my opinion, was any shareholder entitled to assume from the company's memorandum and original articles that the lien, if extended at all, should only be extended so as to give a lien for liabilities incurred after the alteration in the articles. I fail to see why a shareholder, because he became indebted to the company, should acquire special rights against the company in respect of that debt as to the alteration of the articles, or why the company should not, when it obtained its extended lien, use it in respect of any existing debt as well as in respect of debts subsequently incurred. In truth, every shareholder was bound to bear in mind, both in paying up in full his shares, or acquiring fully paid-up shares, and in incurring a debt to the company, that the company had a legal right by altering its articles to extend its lien and might exercise that legal right at any time.

This being so, in my opinion, Mr. Zuccani's shares became bound by the company's alteration of its articles unless he can

shew some special bargain with the company, or some special obligation incurred towards him by the company, in respect of his fully paid-up shares. He fails to establish any such special bargain or obligation. There was certainly no such special bargain or obligation alleged or proved with regard to the shares allotted to him as fully paid up; and as already pointed out, no such bargain or obligation can be implied merely from the wording of art. 29. Nor was there any special bargain or obligation with regard to the shares paid up in full by him after allotment. The fact is, with regard to the latter, that being indebted in very large sums at the time to the company, and paying certain sums on account, he was permitted, as a favour to him, to attribute the payment to a few shares so as to make them paid up. No doubt this was done so as to give him the opportunity, so long as the lien was limited by the original articles, of disposing of the fully paid-up shares, but if he did not avail himself of the opportunity before the alteration of the articles then he could not do so afterwards. I understand that as a matter of fact he did fully avail himself of the opportunity; but even if he did not do so as regards some shares, that would not, in my opinion, prevent those shares from becoming subject to the extended lien. Mr. Zuccani, in respect of all his fully paid-up shares, whether allotted as paid up or not, in fact has obtained and enjoyed all the advantages with regard to lien which the company ever impliedly or expressly promised him—that is to say, the right to deal with the shares without their being subject to any lien so long as the articles remained unaltered and did not extend the lien to fully paid-up shares.

Something was said on behalf of the respondents as to want of good faith on the part of the company in altering its articles. I fail to see any want of good faith. In my opinion it is eminently fair for a company to provide by its articles, as originally framed or as altered by resolutions, that shareholders who are indebted to the company should not be permitted to dispose of their shares without paying their debts, and that the company should have a lien on the shares for the debts. In the ordinary case of a partnership no partner would be permitted

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to withdraw or sell his share in the partnership venture without his debts to the partnership being first paid thereout. And if the company in the present case had, as I think it had, the legal right to alter its articles so as to give it the lien it now claims, I cannot see why, in exercising that legal right, it should be accused of want of good faith. That the reason for the alteration was the very existence of the large debt due from Mr. Zuccani, and that the company had principally in mind this large debt when it made the alteration in the articles, is no ground for impeaching the action of the company. It appears to me the shareholders were acting in the truest and best interests of the company in exercising the legal right to alter the articles so that the company might as one result obtain payment of the debt due from Mr. Zuccani. The shareholders were only bound to look to the interests of the company. They were not bound to consult or consider Mr. Zuccani's separate or private interests.

Further, I may say that the alteration of the articles giving the extended lien was, in my opinion, in no true sense retrospective. The lien given was not made to take effect before the date of the alteration. It operated only from and after that date.

Again, the alteration of the articles cannot be impeached as being one not binding on all shareholders alike. It purports to bind, and does bind, all the shareholders without exception. An article giving a lien cannot be objected to as made in favour of or against a special class of shareholders merely because some shareholders only are or may become indebted to the company.

Lastly, I may say that the contention that there was anything improper in the way the alteration of the articles was effected falls to the ground on examination. It is untrue that the company intentionally waited for the death of Mr. Zuccani before attempting to alter the articles, with the object of thereby preventing votes in respect of his shares being used in considering whether the alteration should or should not be made. Besides, as a matter of fact, under the articles Mr. Zuccani, if living, could not have voted, seeing that he was indebted to the company.

I have now dealt substantially with the points raised on behalf of the respondents, and in the result I can find no good or sufficient ground on which to hold that the lien given by the amended articles was not good against Mr. Zuccani's executors; and accordingly I think that the appeal should be allowed.

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Solicitors: *Mayo & Co.; Kerly, Son & Verden.*

G. I. F. C.

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C. A. 1900 *Feb.* 27, 28; *March* 5, 19.

[1899 S. 340.]

Local Government—Private Street Works—Charge of Expenses on Frontager's Premises—Date from which Charge takes Effect—"Completion of Works" or "Final Apportionment"—Vendor and Purchaser—"Outgoings"—Implied Covenant against Incumbrances—Private Street Works Act, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1, 12, 13.

The amount of the apportioned expenses of private street works executed by a local authority under the Private Street Works Act, 1892, becomes a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold by the owner free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises.

Decision of Kekewich J., [1899] 2 Ch. 496, affirmed.

APPEAL against a decision of Kekewich J. (1)

The question was whether the sum finally apportioned as payable by the owner of premises fronting a street, in respect of works executed in the street by the local authority under the Private Street Works Act, 1892, becomes a charge upon the premises as from the date of the completion of the works, or only as from the date of the final apportionment of the expenses of the works among the owners of premises abutting on the street. In the present case the council of the county borough of West Ham on July 27, 1897, resolved to execute

(1) [1899] 2 Ch. 496

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some sewerage works in a street called Queen's Road within their district. The works were commenced on April 4, 1898, and were completed on July 26, 1898. On October 10, 1898, the defendant, who was the then owner of a piece of land fronting the street, entered into an agreement to sell it to the plaintiff for 1000*l*. The purchase was to be completed on November 11 then next, and up to that day all "outgoings" were (if necessary) to be apportioned. On November 22, 1898, by a deed, which contained a recital that the defendant had agreed to sell the land to the plaintiff free from incumbrances, the defendant, "as beneficial owner," conveyed the land to the plaintiff. On November 29, 1898, the final apportionment of the expenses of the works was made by the council, and on December 29, 1898, they gave notice to the plaintiff that his premises were liable to be charged with the sum of 130*l*. 14*s*. as his proportion of the expenses of the works, and that, unless this sum was paid within one month, interest at 4 per cent. would be charged. The plaintiff called on the defendant to pay this amount, and, on his declining to do so, the plaintiff paid it himself, and brought this action to enforce repayment by the defendant. Kekewich J. held, upon the construction of the Act, that the apportioned sum became a charge upon the land as from the date of the completion of the works, and that consequently it was an incumbrance existing at the date of the conveyance to the plaintiff, and that the defendant was, under his implied covenant against incumbrances, bound to discharge it. The defendant appealed. (1)

(1) By the Public Health Act, 1875, s. 150, "Where any street within any urban district (not being a highway repairable by the inhabitants at large) . . . . is not sewered . . . . and made good . . . . to the satisfaction of the urban authority, such authority may, by notice addressed to the respective owners or occupiers of the premises fronting . . . . on such parts thereof as may require to be sewered . . . . require them to sewer . . . . or make good . . . . the same . . . . If such notice is not complied with, the urban authority may, if they think fit, execute the works mentioned or referred to therein; and may recover in a summary manner the expenses incurred by them in so doing from the owners in default, according to the frontage of their respective premises, and in such proportion as is settled by the surveyor of the urban authority, or (in case of dispute) by arbitration in manner provided by this Act; or the urban authority may by

Warrington, Q.C., and *Vaughan Hawkins*, for the defendant. Under the Public Health Act, 1875, s. 257, it has been held

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order declare the expenses so incurred to be private improvement expenses . . . ."

Sect. 257: "Where any local authority have incurred expenses for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable under this Act . . . . such expenses may be recovered, together with interest . . . . from the date of service of a demand for the same till payment thereof, from any person who is the owner of such premises when the works are completed for which such expenses have been incurred, and until recovery of such expenses and interest the same shall be a charge on the premises in respect of which they were incurred. . . . ."

By the Private Street Works Act, 1892, s. 1, "This Act . . . . shall be construed as one with the Public Health Acts, ... and this Act and the Public Health Acts may be cited together as the Public Health Acts."

Sect. 2: "This Act shall extend and apply to any urban sanitary district in which it is respectively adopted under the provisions of this Act."

Sect. 3 contains provisions as to the adoption of the Act.

Sect. 6: "(1.) Where any street . . . . is not sewered . . . . made good, and lighted to the satisfaction of the urban authority, the urban authority may . . . . resolve with respect to such street . . . . to do any one or more of the following works (in this Act called private street works); that is to say, to sewer . . . . or make good . . . . such street . . . .; and the expenses incurred by the urban authority in executing private street works shall be apportioned (subject as in this Act mentioned) on the premises fronting . . . . on such street . . . .

"(2.) The surveyor shall prepare . . . .

"(*a*) A specification of the private street works referred to in the resolution . . . .;

"(*b*) An estimate of the probable expenses of the works;

"(*c*) A provisional apportionment of the estimated expenses among the premises liable to be charged therewith under this Act.

"Such specification, ... estimate, and provisional apportionment shall comprise the particulars prescribed in Part I. of the schedule to this Act, and shall be submitted to the urban authority, who may by resolution approve the same . . . ." [The schedule, Part I., provides that provisional apportionments shall state (inter alia) "the amounts charged on the respective premises."]

"(3.) The resolution approving the specifications, ... estimates, and provisional apportionments shall be published . . . . and copies thereof shall be served on the owners of the premises shewn as liable to be charged in the provisional apportionment . . . . During one month from the date of the first publication the approved specifications . . . . estimates, and provisional apportionments (or copies thereof certified by the surveyor), shall be kept deposited at the urban sanitary offices, and shall be open to inspection at all reasonable times."

Sect. 7: "During the said month any owner of any premises shewn in a provisional apportionment as liable to be charged with any part of the expenses of executing the works may,

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that the charge for the expenses of works of this nature attaches as from the date of the completion of the works: *Tottenham*

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by written notice served on the urban authority, object to the proposals of the urban authority on any of the following grounds; (that is to say)—

"(*a*) That an alleged street or part of a street is not or does not form part of a street within the meaning of this Act; . . . .

"(*e*) That any premises ought to be excluded from or inserted in the provisional apportionment;

"(*f*) That the provisional apportionment is incorrect in respect of some matter of fact to be specified in the objection . . . ."

Sect. 8 provides for the hearing and determination of objections.

Sect. 12: "(1.) When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment . . . . and such final apportionment shall be conclusive for all purposes; and notice of such final apportionment shall be served upon the owners of the premises affected thereby; and the sums apportioned thereby shall be recoverable in manner provided by this Act, or in the same manner as private improvement expenses are recoverable under the Public Health Act, 1875 . . . .

"(2.) Within one month after such notice the owner of any premises charged with any expenses under such apportionment may, by a written notice to the urban authority, object to such final apportionment on the following grounds, or any of them:

"(*a*) That the actual expenses have without sufficient reason exceeded the estimated expenses by more than fifteen per cent.

"(*b*) That the final apportionment has not been made in accordance with this section.

"(*c*) That there has been an unreasonable departure from the specification, plans, and sections.

"(3.) Objections under this section shall be determined in the same manner as objections to the provisional apportionment."

Sect. 13: "(1.) Any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged (to the like extent and effect as under s. 257 of the Public Health Act, 1875) with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment with interest at the rate of 4*l.* per cent. per annum, and the urban authority shall, for the recovery of such sum and interest, have all the same powers and remedies under the Conveyancing and Law of Property Act, 1881, and otherwise, as if they were mortgagees having powers of sale and lease and of appointing a receiver."

Sect. 14: "The urban authority, if they think fit, may from time to time (in addition and without prejudice to any other remedy) recover summarily in a court of summary jurisdiction, or as a simple contract debt by action in any court of competent jurisdiction, from the owner for the time being of any premises in respect of which any sum is due for expenses of private street works the whole or any portion

Local Board of Health v. *Rowell* (1); *In re Bettesworth and Richer.* (2) But the Act of 1892 provides a different machinery in substitution for that of the Act of 1875, and under its provisions the charge for expenses does not attach until the final apportionment among the owners is made. This is apparent especially from s. 13 of the Act of 1892, which, though it says that the premises shall stand "charged to the like extent and effect as under s. 257" of the Act of 1875, does not say from the same date, and uses the words "as from the date of the final apportionment."

If the charge did not exist at the date of the conveyance to the plaintiff, it cannot be an "incumbrance" within the defendant's implied covenant against incumbrances under s. 7, sub-s. 1 (*a*), of the Conveyancing Act, 1881. Nor was the charge an "outgoing" within the meaning of the contract for sale: *In re Boor.* (3) *Tubbs* v. *Wynne* (4) is distinguishable.

But, even if the charge takes effect as from the date of the completion of the works, it is not an "incumbrance" against which the defendant is under his implied covenant bound to indemnify the plaintiff. It did not arise from any act or omission of the vendor, nor was it "suffered" by him. It did not arise from his default, as would be the case under the Public Health Act, under which the works are executed by the local authority only upon the default of the owner in executing them. Under the Act of 1892 the local authority is to execute the works in the first instance, and then to apportion the expenses among the owners. The charge is an incident of property, like, e.g., land tax, which falls upon the owner for the time being. At the date of the conveyance the vendor was not bound to pay anything to the local authority, and they could not have recovered anything from him.

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of such sum, together with interest at a rate not exceeding 4*l.* per cent. per annum, from the date of the final apportionment till payment thereof."

Sect. 25: "Neither ss. 150, 151, and 152 of the Public Health Act, 1875, nor s. 41 of the Public Health Acts Amendment Act, 1890, shall apply to any district or part of a district in which this Act is in force."

This Act was adopted by the council of West Ham.

(1) (1880) 15 Ch. D. 378.

(2) (1888) 37 Ch. D. 535.

(3) (1889) 40 Ch. D. 572.

(4) [1897] 1 Q. B. 74.

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P. O. Lawrence, Q.C., and *P. F. Wheeler*, for the plaintiff. Under s. 13 the charge is to be "to the like extent and effect" as under s. 257 of the Public Health Act. The words "as from the date of the final apportionment" apply only to the date from which interest is to run; the charge takes effect, as under s. 257 of the Public Health Act, from the date of the completion of the works. By s. 1 of the Act of 1892 that Act is to be construed as one with the Public Health Acts. This being so, the insertion in s. 13 of the words "to the like extent and effect, &c.," was really unnecessary; those words were inserted to make it quite clear that the charge was to be in every respect similar to that under s. 257. The Act of 1892 substitutes other provisions for those of ss. 150, 151, and 152 of the Act of 1875, but there is no alteration of s. 257 except by s. 13, and that does not alter the date from which the charge is to take effect—namely, the completion of the works.

If the charge were to take effect from the date of the final apportionment, the date would differ accordingly as objection was or was not made by the owner, and the time at which the charge would take effect would be uncertain. This was really the ground of the decisions upon s. 257 of the Public Health Act: *Hornsey Local Board* v. *Monarch Investment Building Society*. (1) On the completion of the works there is a present right to receive the amount of the charge, although the exact amount is not then ascertained.

The amount of the charge is an "outgoing" within the meaning of the agreement for apportionment: *Midgley* v. *Coppock* (2); *In re Furtado and Jeffries* (3); *Tubbs* v. *Wynne*. (4)

The charge is also within the implied covenant against incumbrances. The defendant has "omitted" to pay a sum which the local authority had a present right to receive. If the defendant could have paid a sum which, if paid, would have freed the land from a charge, his not paying it is an omission within the meaning of the implied covenant.

[VAUGHAN WILLIAMS L.J. It was not his duty to make the payment.]

(1) (1889) 24 Q. B. D. 1, 5, 10.
(2) (1879) 4 Ex. D. 309.
(3) (1883) 27 Sol. J. 466.
(4) [1897] 1 Q. B. 74.

It was his duty as regarded the purchaser. Moreover, the implied covenant contains the words "made, occasioned, or suffered" by the vendor. The charge came into operation while the defendant was in possession of the property, and he "suffered" it to remain down to the date of the conveyance to the plaintiff: *Egg* v. *Blayney*. (1) Independently of authority, the decision of Kekewich J. is right on principle, for on the completion of the works the vendor had the benefit of them; they probably increased the price obtained by him upon the sale.

The fact that at the date of the completion of the purchase there was no sum which could be presently demanded from the vendor is not an answer to the plaintiff's claim for indemnity. If there had been a mortgage for five years on the premises, the vendor would have been bound to pay it off, though the mortgagee could not have demanded payment of the principal till the end of the five years. So, too, if there had been a charge under the Land Improvement Acts payable by instalments spread over thirty years.

Warrington, Q.C., in reply. The duty of the vendor to indemnify the purchaser against this charge can only arise out of contract. It was his duty under the agreement for sale to convey the property free from incumbrances; but that duty does not extend to a charge imposed by an external authority. The word "suffered" implies some control on the part of the man who suffers or permits. Here the charge does not depend at all upon the will of the owner of the premises. But the rights of the parties are really regulated by the conveyance. The obligation arising under the Act of 1892 is quite different from that which arose under the Act of 1875. Under that Act the owner had to pay the cost of works which the local authority had executed by reason of his default in not doing them. Under the Act of 1892 the owner has no choice in the matter; he has to pay his apportioned part of the cost when the demand is made upon him. Under that Act the charge was intended to be an incident of the property, like land tax.

(1) (1888) 21 Q. B. D. 107, 108.

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The distinction is illustrated by *Barraud* v. *Archer*. (1) This charge is not covered by the covenant against incumbrances. It has not been "suffered" by the vendor. That word imports something over which he had control: *Hobson* v. *Middleton*. (2) Again, the word "omitted" in the covenant cannot extend to every incumbrance which the vendor might, if he had chosen, have discharged, e.g. to an incumbrance created before the last purchase for value. The defendant cannot be said to have "omitted" to pay this charge. He could not pay it before the amount was ascertained. If the local authority had accepted less than the proper sum they would have been guilty of a breach of trust. It would be impossible for the owner to make any tender until the amount had been ascertained. The local authority have no power to accept a composition.

It is the final apportionment which creates the charge. By s. 13 the "premises included in the final apportionment" are to "stand and remain charged." And by s. 14 the local authority are empowered to recover the amount "from the owner for the time being," i.e., the owner at the time when the proceedings are taken. Sect. 257 of the Act of 1875 does not apply as regards the date from which the charge attaches. The "like extent and effect" makes the charge operate—for instance, on the total ownership, i.e., "on the respective interest of every owner for the time being in proportion to the value of his interest": *Birmingham Corporation* v. *Baker*. (3)

As to the provision for "outgoings," *Midgley* v. *Coppock* (4) arose under a special Act relating to Manchester. *Plumstead Board of Works* v. *Ingoldby* (5) was a case under the Metropolis Management Acts, under which the local authority could sue for the estimated expenses before commencing the works. That cannot be done under the Act of 1892.

Cur. adv. vult.

March 19. VAUGHAN WILLIAMS L.J. read the judgment of the Court (Lindley M.R. and Rigby and Vaughan Williams L.JJ.), in

(1) (1828) 2 Sim. 433; (1831) 9 L. J. (O.S.) (Ch.) 173; 29 R. R. 129.
(2) (1827) 6 B. & C. 295.
(3) (1881) 17 Ch. D. 782.
(4) 4 Ex. D. 309.
(5) (1872) L. R. 8 Ex. 63.

which (after stating the facts as above) he continued:—If the charge had been a charge for expenses incurred by the local authority under the Public Health Act, 1875, there is no doubt it would, having regard to the dates of the agreement to purchase and the conveyance on the one hand, and the date of the execution of the works on the other, have been a charge against which the vendor would have had to indemnify the purchaser. The charge under the Public Health Act, 1875, however, is a charge which can only arise on the failure of the owner of the land to comply with the notice of the urban authority and the execution by the urban authority of the works by reason of that default of the landowner, and is, moreover, a charge taking effect from the date of the completion of the works, whereas the charge under the Private Street Works Act, 1892, certainly is not a charge arising on the default of the landowner, and it is argued it is not a charge taking effect from the date of the completion of the works. It becomes necessary, therefore, to consider from what date the charge under the Act of 1892 takes effect, and whether the fact that the charge does not arise on the default of the landowner makes any difference in the obligations of the vendor towards the purchaser, and this makes it necessary to consider the terms of the material sections of the Acts of 1875 and 1892. Under s. 257 of the Public Health Act, 1875, the expenses incurred by the local authority, for the repayment whereof the owner of the premises for or in respect of which the same are incurred is made liable by that Act (i.e., by s. 150), may be recovered from any person who is the owner of the premises when the works are completed for which the expenses have been incurred, and until recovery the expenses are made a charge on the premises in respect of which they were incurred, and it was held in *In re Bettesworth and Richer* (1) that the expenses become a charge upon the completion of the works, and that this is so notwithstanding the fact that the owner could not be compelled to pay until the cost had been made out and apportioned. In other words, the charge was held to be subsisting although it could not be enforced until the provision in the last paragraph but one of

(1) 37 Ch. D. 535.

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s. 257 had been worked out—i.e., until the apportionment of the expenses had become binding by the lapse of three months after notice of apportionment without any written notice of dispute being given by the owner. This decision turned entirely on the words of ss. 150 and 257, which plainly gave a charge so soon as the works had been completed and the expenses incurred by the local authority on the failure of the owner of the land to execute the works in compliance with a notice served in pursuance of the powers given by s. 150.

The charge which has to be considered in the present case is given by s. 13 of the Private Street Works Act, 1892, and we have to determine whether this charge, like the charge under the Public Health Act, 1875, takes effect from the time of the completion of the works. We think it does. The Act of 1892 is by s. 1 to be construed as one with the Public Health Acts, of which the Act of 1875 is the principal Act, and the charge created by s. 13 of the Act of 1892 is to be a charge "to the like extent and effect" as under s. 257 of the Act of 1875. It seems to us to follow, unless there is in s. 13 or some other section of the Act of 1892 something clearly to the contrary, that the charge under s. 13 will take effect, like the charge under the Act of 1875, from the time of the completion of the works the expenses of which are charged. But it is said that s. 13 itself makes express provision to the contrary, because it says, "any premises included in the final apportionment, and all estates and interests from time to time therein, shall stand and remain charged . . . . with the sum finally apportioned on them, or if objection has been made against the final apportionment with the sum determined to be due as from the date of the final apportionment, with interest at the rate of 4 per cent. per annum." It is said that the effect of these words is that there is no charge until the date of the final apportionment, and therefore no charge from the date of the completion of the works. We cannot agree to this contention. We think that the effect of these words is, first, to provide that the amount of the charge shall be that fixed by the final apportionment, or in case of objection by the determination of the objection; and, secondly, that interest is to run on the sum ultimately fixed

from the date of the final apportionment. In other words, the owner of the land is not by his objection to the final apportionment to escape interest on the sum finally fixed between the date of the final apportionment and the date of the final determination of the objection. We think, therefore, that there is nothing in s. 13 to prevent the charge taking effect from the completion of the works. And when the whole of the Act of 1892 is considered, we find a great deal to lead to the conclusion that it means that the charge shall date from the completion of the works, and not from the final apportionment. In the first place, there is the general consideration that it is not likely the Legislature should have intended the charge to date from the final apportionment, because the final apportionment is an event the date of which can be fixed quite arbitrarily by the officers of the local authority. Moreover, to make the charge commence with the completion of the works is to make it coincide with the benefit. In the next place, the whole scheme of the Act points to a charge being intended prior to the final apportionment. First, there is the provisional apportionment of the estimated expenses on the premises liable to be charged. This, subject to objections to be made within a month, fixes the premises to be charged and the proportions to be borne. All this has to be done before the works are executed. Then s. 12 provides: "When any private street works have been completed, and the expenses thereof ascertained, the surveyor shall make a final apportionment by dividing the expenses in the same proportions in which the estimated expenses were divided in the original or amended provisional apportionment (as the case may be)." These words are, in our judgment, strong to shew that on the completion of the works the expenses become a charge on ascertained premises in ascertained proportions. There is no appeal against this, and the final apportionment is a mere arithmetical process for the purpose of dividing these expenses in these proportions. The final apportionment is not a condition precedent to the obligation to bear these expenses in these proportions. The obligation exists before the final apportionment is made. The final apportionment merely works out the division of these expenses in these

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proportions amongst the premises charged. The objections which, by clause 2 of s. 12, can be taken after final apportionment are not objections to the proportions or to the inclusion or exclusion of particular premises amongst those charged (all those objections have to be made before the works are executed), but are either objections that the proportions have not been followed, or are objections to the totals of the expenses to be divided. All this statutory machinery seems to us to point to the charge taking effect from the completion of the works. The charge takes effect under the Act of 1875 before the apportionment is made, and in our judgment it is intended that this shall be so under the Act of 1892. If this view is right, we have no doubt that this charge is an "outgoing" which the vendor was bound by his contract to discharge. We also have no doubt that the charge is an "incumbrance, claim or demand suffered" by the vendor, notwithstanding the fact that the expenses were incurred without any default on his part, and that the time for payment had not arrived before the conveyance was executed. Nor have we any doubt that this charge is inconsistent with the express terms of the conveyance. We think, therefore, that this appeal should be dismissed with costs.

Solicitors: *Farrer & Co.; George Brown, Son & Vardy.*

W. L. C.

VESTRY OF THE PARISH OF ST. MARY, ISLINGTON *v.* HORNSEY URBAN DISTRICT COUNCIL.

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Feb. 22, 23, 26, 27; *March* 20.

[1898 S. 2629.]

London County—Drainage and Sewerage—Metropolitan Drainage System—Agreement to admit Foreign Sewage—Public Body—Injunction—Ultra Vires—Estoppel—Laches and Acquiescence—Metropolis Management Act, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 138, 140, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61.

Under s. 61 of the Metropolis Management Amendment Act, 1862, the vestry of a parish within the metropolitan area cannot, even with the consent of the London County Council, enter into a binding agreement to receive sewage from a district without the metropolitan area.

The reasoning of Hall V.-C. in *Metropolitan Board of Works* v. *London and North Western Ry. Co.*, (1880) 14 Ch. D. 521; (1881) 17 Ch. D. 246, approved.

Where the plaintiffs, the vestry of a parish within the metropolitan area, made an arrangement with certain landowners of a district without the metropolitan area (now represented by the defendants, the urban district council) whereby the discharge of some sewage from the defendants' district into a sewer belonging to the plaintiffs had been permitted for many years, and this additional sewage had increased so as periodically to choke up the plaintiffs' sewer:—

Held, that this arrangement operated in law merely as a revocable licence, and that the plaintiffs, being a public body with public duties to perform, were not estopped or precluded by laches or acquiescence from bringing an action for an injunction to restrain the defendants from using the sewer; but

Held, that, having regard to the conduct of the plaintiffs and to the difficulty in which an injunction would place the defendants by compelling them to close their sewers, the Court ought only to make a declaration that the defendants were not entitled to send sewage from their district into the plaintiffs' sewer without the consent of the plaintiffs.

This was an appeal from a decision of Kekewich J. The object of the action was, in substance, to compel the defendants to disconnect some sewers in their district from a sewer in the Stroud Green Road, North London, and to restrain the defendants from permitting any future connection of drains or sewers in their district with the said Stroud Green Road sewer.

The material facts were as follows. Islington and its sewers were within the metropolitan area. Hornsey adjoined Islington,

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and Hornsey and its sewers were without the metropolitan area. One part of Hornsey sloped down towards Islington, and the natural drainage of that part of Hornsey was towards the boundary of the two parishes near which the Stroud Green sewer ran. This sewer ran ultimately into the metropolitan high level sewer. There was a dispute as to whether part of this Stroud Green sewer was in Hornsey or in Islington. The part claimed by both parishes was about ninety-eight rods in length at the upper end, i.e., the north-west end of this sewer. The Stroud Green sewer was part of a longer sewer made by the Tottenham and Hampstead Railway Company, under the provisions of an Act of Parliament passed in 1862 and called the Tottenham and Hampstead Junction Railway Act, 1862. The whole of this longer sewer, with the exception of the ninety-eight rods in dispute, was unquestionably in Islington. The railway company, in fact, made a longer sewer than they were bound to make. They did so at the request and partly at the expense of the Islington Vestry, with the approval of the Metropolitan Board of Works, for the purpose of more effectually draining Islington, and, so far as the evidence shewed, without any reference to Hornsey at all. The Stroud Green portion of the sewer was for some distance close to the boundary of the two parishes, and the dispute as to the ninety-eight rods arose from the difficulty of fixing the boundary. Upon the evidence the Court found that the whole of the Stroud Green sewer (including the ninety-eight rods in dispute) was an Islington sewer in the parish of Islington, and was vested in the plaintiffs by the joint operation of the Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), s. 68, and the Tottenham and Hampstead Junction Railway Act, 1862, s. 59. The Hornsey sewers were vested in the defendants by s. 13 of the Public Health Act, 1875.

The defendants, besides disputing the ownership of the Stroud Green sewer, resisted the plaintiffs' claim to an injunction upon the ground that the connections complained of had been made by certain landowners of Hornsey with the knowledge and consent of the plaintiffs, and that they had no power to stop these connections. The short result of the evidence

upon this point was as follows: When the Stroud Green sewer was formed Hornsey was a purely agricultural parish. A Mr. Lucas and a Mr. Wharmby and some others who owned land in Hornsey abutting on Stroud Green began to build in and after 1865, and they were allowed by the plaintiffs to make comparatively small sewers (mostly 12-in. pipes) into the Stroud Green sewer on certain conditions and on making certain payments, involving in Lucas's case a payment of 670*l.* to the railway company. In the years 1871–76 Lucas and others, who had paid various sums to the railway company with the consent of the plaintiffs towards defraying the cost of making the Stroud Green sewer and for liberty to run sewage into it, applied to the defendants to repay them these sums. The application was made on the ground that unless such repayment was made injustice would be inflicted upon the applicants by the Hornsey Local Board Act, 1871 (34 & 35 Vict. c. cxxix.). The defendants repaid Lucas and others the sums they had paid for permission to connect their sewers with the Stroud Green sewer, and this was done after consulting the plaintiffs and after obtaining from them an assurance that they had no objection to the acquisition by the defendants of the same rights of drainage as Lucas and the other owners had. In November, 1883, the defendants obtained from the plaintiffs leave to enlarge two of the small sewers opening into the Stroud Green sewer in consideration of the defendants' contributing to the expense of repairing a footpath on the Islington side of the Stroud Green Road. Under this arrangement two 18-in. pipes were substituted for one 12-in. and one 15-in. pipe.

These sewers had from time to time been connected with other sewers and drains in the Hornsey district, and the sewage and surface water discharged into the Stroud Green sewer had increased to such an extent that after heavy rains the Stroud Green sewer became choked up, and a serious nuisance was caused to the inhabitants of Islington.

Kekewich J. dismissed the action with costs. He thought that he might fairly assume that the Stroud Green sewer was an Islington sewer, and he came to the conclusion on the evidence that the nuisance complained of was caused by the

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addition of the Hornsey sewage to the Islington sewage. But the defendants had, in some cases without asking the consent of the plaintiffs, sanctioned the connection of drains in their district, directly or indirectly, with the plaintiffs' sewer; and upon the authorities it was doubtful whether they had any power to recall that sanction. In his Lordship's opinion that doubt did not depend upon the competence or incompetence of the local authority to give the sanction. He thought that the existence of that doubt was a sufficient ground for refusing to compel the defendants to put an end to the connections they had sanctioned. Another ground for refusing to interfere was that any order compelling the defendants to disconnect their sewers with the plaintiffs' sewer would create a public nuisance, since it would involve the discharge of the sewage upon the surface of the land. With regard to future connections, it was proved that the defendants' district was already completely built over, and there was no probability of any substantial increase in the discharge of sewage into the plaintiffs' sewer, and he thought that no practical benefit would result if an injunction were granted. The plaintiffs' case therefore failed.

The plaintiffs appealed.

Danckwerts, Q.C., and *Micklem, Q.C.*, for the plaintiffs. The Stroud Green sewer is within the metropolitan district and is, under the Metropolis Management Acts, vested in the plaintiffs: Metropolis Management Act, 1855 (18 & 19 Vict. c. 120), ss. 68, 80; Metropolis Management Amendment Act, 1862 (25 & 26 Vict. c. 102), ss. 58, 59. The main sewers were vested in the Metropolitan Board of Works (now in the London County Council): Metropolis Management Act, 1855, ss. 135, 137; and they have a control over the vestries: s. 138. By s. 59 of the Tottenham and Hampstead Junction Railway Act, 1862, the Stroud Green sewer was constructed by the railway company in substitution for a sewer which was vested in the plaintiffs, and it stands in the same position as the sewer which it replaced. The sewer was constructed to convey only sewage from the parish of Islington. The defendants, whose district is outside the metropolitan district, have no power under the Metropolis

Management Acts to connect their drains or sewers with the plaintiffs' sewer without the plaintiffs' consent. There is in the Public Health Act, 1875 (38 & 39 Vict. c. 55), ss. 22, 28, power for a local authority to permit drains and sewers from their district to be connected with their sewers, but that Act does not apply to the metropolis. The defendants have no power under the Hornsey Local Board Act, 1871, to use the plaintiffs' sewer. The inference to be drawn from the language of the Metropolis Management Acts, 1855 and 1862, is that the system of drainage thereby authorized was intended solely for the benefit of the metropolis. The admission into that system of sewage from outside the metropolitan area was not contemplated. The defendants in sending their sewage into the plaintiffs' sewer are mere trespassers. The plaintiffs in consenting to the connection of certain sewers in Hornsey with their sewer at most gave a revocable licence which they have now revoked. The plaintiffs could not, even with the consent of the Metropolitan Board, have allowed Hornsey sewage to be conveyed through their sewer otherwise than by giving to the defendants a revocable licence. Anything beyond that, e.g., a contract under seal, would have been ultra vires and necessarily null and void; and there was in fact no such contract: *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (1); *Ayr Harbour Trustees* v. *Oswald.* (2) The plaintiffs have no power to use their sewers for purposes for which they were not constructed: *Mulliner* v. *Midland Ry. Co.* (3) The mere fact that the granting of the injunction which the plaintiffs claim will place the defendants in a difficulty as to the disposal of their sewage and might compel them to create a nuisance is not an answer to the claim. By the Public Health Acts the duty of draining their district is imposed on the defendants. It is a mere question of expense, and if necessary the defendants must apply for larger statutory powers.

[VAUGHAN WILLIAMS L.J. referred to *Attorney-General* v. *London and North Western Ry. Co.* (4)

(1) 14 Ch. D. 521; 17 Ch. D. 246.
(2) (1883) 8 App. Cas. 623, 634.
(3) (1879) 11 Ch. D. 611, 622.
(4) [1900] 1 Q. B. 78.

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LINDLEY M.R. referred to *Goldsmid* v. *Tonbridge Wells Improvement Commissioners.* (1)]

Kekewich J. has misapprehended the effect of such decisions as *Glossop* v. *Heston and Isleworth Local Board* (2); *Attorney-General* v. *Dorking Union* (3); *Attorney-General* v. *Acton Local Board* (4); *Attorney-General* v. *Clerkenwell Vestry.* (5) He proceeded upon the footing that the defendants could not compel inhabitants whom they had allowed to connect their drains with the plaintiffs' sewer to disconnect; but that was not really the question, because the defendants were bound to provide an outfall for their sewage. *Attorney-General* v. *Acton Local Board* (4) is distinguishable, because in that case there was no substantial damage done to the plaintiffs; and the question of ultra vires was not there discussed. The defendants have invaded the plaintiffs' property and are throwing upon the plaintiffs a burden which no Act of Parliament authorizes them to do. The plaintiffs are, therefore, entitled to an injunction in the form in *Brown* v. *Dunstable Corporation.* (6)

Macmorran, Q.C., and *F. Low*, for the defendants. It is said that the defendants are invading the plaintiffs' property and are trespassers; but leave and licence is a good answer to an action for trespass. Moreover, the connections complained of were not made by the defendants, but were made by persons over whom the defendants had no control, and they were made with the consent of the plaintiffs given for valuable consideration. From the slope of the ground Lucas and the other landowners would not have laid out their land in building unless they had been allowed to make sewers into the metropolitan system. The defendants could not have prevented them from making these connections and could not have refused to approve the plans of the proposed buildings on that ground: *Reg.* v. *Tynemouth Rural Council.* (7) After the passing of the Hornsey Local Board Act, 1871, which placed the district of Hornsey as

(1) (1866) L. R. 1 Ch. 349.
(2) (1879) 12 Ch. D. 102.
(3) (1882) 20 Ch. D. 595.
(4) (1882) 22 Ch. D. 221.
(5) [1891] 3 Ch. 527.
(6) [1899] 2 Ch. 378.
(7) [1896] 2 Q. B. 219.

regards drainage in the same position as the rest of the metropolis, the defendants refunded to the landowners the sums they had paid to the plaintiffs for permission to connect their sewers with the Stroud Green sewer. That cannot place the defendants in any worse position as regards trespass than the landowners who obtained the plaintiffs' leave to make the connections, and they are not responsible to the plaintiffs for maintaining those connections. As a general rule a licence is revocable, but where the licensee has to the knowledge of the licensor incurred expense and altered his position on the faith of the licence, it is no longer revocable.

Then it is said that assuming that the defendants gave a licence to the landowners or entered into an agreement with them, they acted ultra vires and the whole transaction is illegal. But the plaintiffs cannot take advantage of their own wrong to obtain an injunction from a court of equity on the ground of ultra vires. No doubt the Attorney-General might have taken proceedings, but that is not this case.

[VAUGHAN WILLIAMS L.J. referred to *Burkinshaw* v. *Nicolls*. (1)

LINDLEY M.R. referred to *Great North-West Central Ry. Co.* v. *Charlebois*. (2)]

Assuming that the plaintiffs can assert in this action that their own illegal act was ultra vires, we say that the giving of the consent by the plaintiffs in this case was not ultra vires. The powers of s. 61 of the Metropolis Amendment Act, 1862, are not confined to persons within the metropolis. It is true that there is a dictum of Hall V.-C. to the contrary in *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (3), but that dictum was not indorsed by the Court of Appeal (4), and it was not necessary to the decision of the case, since it was there held that there was no consent in fact.

[VAUGHAN WILLIAMS L.J. Assuming that your contention is correct, would not the consent of the Metropolitan Board be required under that section?]

The consent of the board was not necessary to enable a

(1) (1878) 3 App. Cas. 1004.
(2) [1899] A. C. 114.
(3) 14 Ch. D. 521, 528.
(4) 17 Ch. D. 246.

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connection to be made with the local sewer of the Islington Vestry. By the Metropolis Management Act, 1855, the main sewers are vested in the Metropolitan Board, and the local sewers are vested in the vestries of the several parishes, and by s. 61 of the Act of 1862 the consent of the board applies to the sewers vested in them, and the consent of the vestry applies to the sewers vested in them. That section does not prevent the local authority or the Metropolitan Board from receiving sewage from outside the metropolitan area. The consent is the protection against the improper admission of sewage.

We also rely upon long user with the full acquiescence of the plaintiffs as a bar to their claim to relief.

In the circumstances an injunction ought not to be granted.

Danckwerts, *Q.C.*, in reply. If the plaintiffs have done that which is ultra vires, lapse of time is not an obstacle to the relief which they claim: *Ashbury Railway Carriage and Iron Co.* v. *Riche* (1); *Hobbs* v. *Midland Ry. Co.* (2); *Haywood* v. *Lowndes*. (3)

If the plaintiffs have established their right they are entitled to an injunction, though its operation may be suspended for a time to enable the defendants to make other arrangements for the disposal of their sewage.

Cur. adv: vult.

March 20. LINDLEY M.R. delivered the judgment of the Court (Lindley M.R., Rigby and Vaughan Williams L.JJ.) as follows:—The appeal in this case raises two important questions, namely, whether the defendants are entitled to have the sewage from part of the parish of Hornsey pass down a sewer called Stroud Green sewer, some part of which, at all events, is in the parish of Islington and is vested in the plaintiffs; and, secondly, whether, if this question is decided against the defendants, the plaintiffs are entitled to an injunction to prevent such passage, seeing that, if it were prevented, a very serious public nuisance would be the consequence. The learned judge has dismissed the plaintiffs' action and they

(1) (1875) L. R. 7 H. L. 653, 672. (2) (1882) 20 Ch. D. 418.
(3) (1859) 4 Drew. 454.

are the appellants. [His Lordship stated the facts relating to the construction of the Stroud Green sewer as above set out, and discussed the evidence upon the question who was entitled to the disputed portion of the sewer with the result above stated, and he continued as follows :—]

The next question for consideration is what rights, if any, the defendants have to send the contents of their sewers into the Stroud Green sewer, which is vested in the plaintiffs. These rights, if any, must be conferred by statute or be based on some agreement. A careful examination of the statutes leads to the negative conclusion that there is nothing in them which confers any such right apart from the agreement. The statutes which have to be considered are the Public Health Act, 1875, and the Metropolis Management Acts, 1855 and 1862. These contain sections under which drains from private houses can be made into sewers, and under which arrangements can be made with the consent of the Metropolitan Board of Works for connecting sewers in the metropolis with the main sewers, and under which arrangements can be made between several parishes all within the metropolitan area for connecting the sewers of such parishes. But we have looked in vain for any enactment which provides for or authorizes a parish beyond the metropolitan area to send its sewage into any sewer of any parish within those limits without the consent of such parish. We know as a matter of fact that in 1871 the Hornsey local authority had to obtain a special Act of Parliament to enable them to get rid of their sewage from another part of their parish which slopes in another direction.

If, then, the plaintiffs are bound to receive the sewage from Hornsey it must be by virtue of some agreement or consent which they cannot recall ; and it is upon such an agreement or consent that the defendants mainly rely. It is necessary, therefore, to ascertain what agreement or consent has been entered into and its legal effect.

There is no formal agreement under seal nor any formal agreement to which the Metropolitan Board of Works were parties. But there is abundant evidence of arrangements between the plaintiffs and the defendants and persons in

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Hornsey by which the passage of some Hornsey sewage through the plaintiffs' Stroud Green sewer has been permitted for many years. These arrangements and the conduct of the plaintiffs are strongly relied upon by the defendants as disentitling the plaintiffs from any relief in this action, and Kekewich J. has decided against them mainly on this ground. The appellants' counsel did not deny the facts relied upon by the defendants, but he contended that, although the plaintiffs had permitted Hornsey sewage to pass down their sewer for many years, they had done nothing to preclude them from recalling their permission if and when the Hornsey sewage so increased in bulk as to create a nuisance in Islington. He also contended that the plaintiffs could not in point of law bind themselves and the parish of Islington to receive Hornsey sewage for ever, or, indeed, for any definite period, and that in effect all that the plaintiffs had done and all that they legally could do was to grant revocable licences to various persons now represented by the defendants to empty their sewers into the Stroud Green sewer.

The inability of the plaintiffs to do more than this is said to be established by the statutory enactments and by the decision of Hall V.-C. in *Metropolitan Board of Works* v. *London and North Western Ry. Co.* (1), which was affirmed on appeal. (2) The Vice-Chancellor certainly expressed a strong opinion that even the Metropolitan Board of Works could not make a valid contract to admit buildings outside the metropolitan area into their drainage system. The Court of Appeal expressed no opinion on this point, but affirmed the Vice-Chancellor's decision on the ground that no such contract had in fact been entered into. The point turns mainly on s. 61 of the Metropolis Management Amendment Act, 1862, which, however, has to be read in connection with ss. 135, 138, 140, and 250 of the Metropolis Management Act, 1855.

Having carefully studied these sections, we have come to the conclusion that the construction put upon them by Hall V.-C. is correct, and we adopt his reasoning on pages 527–9 in the report. What the Metropolitan Board of Works could not do

(1) 14 Ch. D. 521. (2) 17 Ch. D. 246.

the plaintiffs clearly cannot do. It follows that Mr. Danckwerts has, in our opinion, made good his contention that, whatever the plaintiffs may have submitted to or even agreed to do, the legal effect of their conduct cannot be put higher than leave and licence to several persons to empty their sewers into the Stroud Green sewer. Having regard to the statutes a grant of an easement or an enforceable agreement to grant an easement cannot be established in law even if proved in fact. A temporary permission is very different from a binding agreement or grant.

This conclusion renders it unnecessary to examine very minutely what the plaintiffs have hitherto really assented to. [His Lordship stated the result of the evidence upon this point as above set out, and continued :—]

These are the main facts relied upon by the defendants as precluding the plaintiffs from obtaining relief in this action. Before considering their legal bearing it is necessary to allude to the circumstances which have occasioned the present controversy. We do not understand that the plaintiffs would complain if the sewers sanctioned by them on the application of Lucas, Wharmby, and the other landowners were used for no other houses than were contemplated by them and the plaintiffs when that sanction was given. But building in Hornsey has gradually increased, and other sewers have from time to time been connected with those which the plaintiffs allowed to be made, and the quantity of sewage passing through them into the Stroud Green sewer has so increased that it can no longer carry off the sewage which comes into it. The consequence is that after a storm the sewage in it is forced back and rises through manholes and gullies and creates an intolerable nuisance in Islington. This is what the plaintiffs want to stop.

This is not a question affecting the plaintiffs as private individuals. They are a public body, with public duties, and with rights and powers conferred upon them for the purpose of enabling them to discharge those duties. This must be borne in mind in considering the effect of their past conduct, when that is relied upon as estopping them from asserting a right to

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put an end to what they have permitted, and even encouraged and agreed to allow. If this were an information by the Attorney-General, instead of an action by the Islington Vestry, the defendants would, in our opinion, have no defence whatever to the claim for an injunction. Considering who the plaintiffs are, we cannot think that they are estopped at law or in equity from obtaining the relief they seek. In *Fairtitle* v. *Gilbert* (1) some turnpike trustees who had power to mortgage their tolls, but not toll-houses, mortgaged both by deed. They were, nevertheless, held entitled to recover the toll-houses from their mortgagees, and the doctrine of estoppel was held inapplicable to the case, on the ground that the plaintiffs were a public body, with limited powers conferred by statute, and could not exceed those powers. Many other decisions to the same effect are to be found in the books, the most recent being the *Great North-West Central Ry. Co.* v. *Charlebois* (2) in the Privy Council, where a public company, which had entered into an agreement beyond its powers and had consented to a judgment against it in an action brought on that agreement, was nevertheless held entitled to impeach both the agreement and the judgment, and both were set aside. For similar reasons the plaintiffs cannot, in our opinion, be treated as precluded from obtaining relief on the ground of laches and acquiescence. This is not a case in which the Court can properly leave the plaintiffs to their legal remedies, for there are none which would be of any use to them. But, in considering the terms of the order which ought to be made, it is only right and proper to have regard to the fact that the plaintiffs have to some extent themselves brought about the present state of things.

The fact that if an injunction were granted a nuisance would be a necessary consequence unless the defendants take steps to prevent it affords them no defence to the action even if it be true that they cannot prevent it without obtaining further statutory powers. It is the defendants' duty to keep the Hornsey sewage out of the plaintiffs' sewer, and the defendants cannot effectually urge their inability to perform their duty as a reason for the Court doing nothing. Upon this point

(1) (1787) 2 T. R. 169; 1 R. R. 455. (2) [1899] A. C. 114.

Attorney-General v. *Birmingham Corporation* (1) and *Attorney-General* v. *Colney Hatch Lunatic Asylum* (2) are well-known authorities. At the same time, the difficulty in which an injunction may place public bodies, if compelled to close sewers under their control but in daily use, has induced the Court in many cases not to exert its jurisdiction to the utmost, where it is not absolutely essential to do so. *Attorney-General* v. *Acton Local Board* (3) and other cases following it, and cited in the argument, are illustrations of this reluctance. Having regard to these decisions and to the conduct of the plaintiffs, we think that all that the Court ought to do in this case at the present moment is to make a declaration establishing the plaintiffs' right to relief and to give the defendants reasonable time to do what is necessary to prevent the flow of the Hornsey sewage down the Stroud Green sewer to the injury of the plaintiffs, and to give the plaintiffs liberty to apply for an injunction at the end of that time. This will give the defendants time to make other arrangements, and we trust will induce the plaintiffs to assist them in their endeavours to do what is necessary to drain their own district without invading the plaintiffs' rights. Such an order will, we think, be more just than an injunction now with a stay of execution. Such an injunction, however carefully worded, might prove unnecessarily oppressive.

The order of the Court, therefore, will be as follows: Allow the appeal and reverse the judgment of the Court below, and order the defendants to pay the costs of the action and of the appeal. Declare that the Stroud Green sewer in the pleadings mentioned is throughout its whole length in the parish of Islington, and is vested in the plaintiffs, and that the defendants are not entitled to send sewage from any sewer in the parish of Hornsey into that sewer without the consent of the plaintiffs. And let the plaintiffs be at liberty to apply to the judge to whose Court this action is attached at the end of twelve months from the date of this order for an injunction to enforce their rights as above declared.

Solicitors: *Bramall; L. J. Tatham.*

(1) (1858) 4 K. & J. 528. (2) (1868) L. R. 4 Ch. 146.
(3) 22 Ch. D. 221.

H. B. H.

C. A.
1900
COZENS-HARDY J.
March 2.
C. A.
March 21.

In re CANNING JARRAH TIMBER COMPANY (WESTERN AUSTRALIA), LIMITED.

[0024 of 1900.]

Company—Winding-up—Reconstruction—Scheme of Arrangement with Creditors—Sanction of Court—Companies Act, 1862 (25 & 26 *Vict. c.* 89), *s.* 161 —*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104).

A company having passed special resolutions for a voluntary winding-up and the adoption of a scheme of arrangement with their debenture-holders, the scheme was assented to by the statutory majority of the debenture-holders, as provided by the Joint Stock Companies Arrangement Act, 1870.

The scheme provided (inter alia) that a new company should be formed, and that the liquidator should enter into an agreement with that company for the transfer to it of the undertaking and assets of the old company; that the new company should issue debenture stock to the debenture-holders of the old company in satisfaction of their debentures; that every shareholder in the old company should be entitled to claim a share in the new company in respect of each share held by him in the old company; that the new company should not be bound to allot any share unless the member entitled thereto should, within three weeks from the sanction of the scheme by the Court, claim his allotment and make a specified payment on account of the liability thereon; and that as regarded unclaimed shares the liquidator should use his best endeavours to sell the same, and should divide the net proceeds of sale rateably among the non-claiming members of the old company. Subject to the provisions of the scheme, the new company was to take over and discharge all the liabilities of the old company and to indemnify the old company.

Among the special resolutions passed by the shareholders of the old company was one which authorized the directors and the liquidator or either of them "to procure underwriting for all or any of the capital of the new company, on such terms and conditions as they or he may approve, and to pay for the same out of the assets of the company."

In pursuance of this resolution the liquidator entered into two agreements with persons who agreed to apply for and take up all the shares in the new company which should not be taken up by the shareholders in the old company, in consideration of a commission of 3*d.* per share on all the shares of the new company, 250,000 in number.

No shareholder of the old company had given a notice under s. 161 of the Companies Act, 1862, requiring the liquidator to purchase his shares.

Upon a petition under the Joint Stock Companies Arrangement Act, 1870, for the sanction of the Court to the scheme:—

Held, by Cozens-Hardy J., that the underwriting agreements were illegal, and that the Court ought not to sanction the scheme.

The Court of Appeal sanctioned the scheme on the undertaking of the

liquidator (1.) to pay the unsecured creditors of the old company in full out of the assets in his hands; (2.) not to act upon the resolution as to underwriting, and to procure the cancellation of the underwriting agreements; and (3.) that three shareholders of the old company who opposed the scheme should, if they elected within three days to dissent from the special resolutions passed by the company, be entitled to all the statutory rights of dissentient shareholders under ss. 161 and 162 of the Companies Act, 1862.

THIS was a petition, intituled in the matter of the Companies Acts, 1862 to 1893, and in the matter of the Joint Stock Companies Arrangement Act, 1870, for the sanction of the Court to a scheme of arrangement for reconstructing the Canning Jarrah Timber Company (Western Australia), Limited, which provided for the formation of a new company and the substitution for the existing debenture liability of a different debenture liability of the new company.

The company was registered on December 31, 1897, with a share capital of 250,000 1*l.* shares, which were all issued and fully paid up.

The company had issued 1000 first mortgage 5*l.* per cent. debentures of 100*l.* each, secured by two trust deeds, of which fifty had been redeemed. The moneys secured by the debentures had become payable by reason of the resolution to wind up the company mentioned below.

The conditions under which the debentures were issued contained a power for a general meeting of debenture-holders (inter alia) to sanction a compromise with the company, provided it were one which the Court would have jurisdiction to sanction under the Joint Stock Companies Arrangement Act, 1870, or any statutory modification thereof, if the company were being wound up, and a power to sanction any modification or compromise of the rights of the debenture-holders against the company.

The unsecured debts of the company were small in amount, and the assets immediately available were more than sufficient to satisfy them.

The proposed scheme of arrangement was as follows :—

1. "A new company shall be incorporated under the Companies Acts, 1862 to 1898, as a company limited by shares.

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The name of the new company shall be the Canning Jarrah Timber Company, Limited, or such other name as the liquidator of the present company shall select. The nominal capital of the new company shall be 125,000*l.*, divided into 250,000 shares of 10*s.* each. The objects of the new company shall include the acquisition of the undertaking and assets of the present company. The memorandum and articles of association shall be subject to the approval of the liquidator."

2. "The liquidator of the present company shall enter into an agreement with the new company for the transfer to the new company, upon the footing and subject to the provisions of this scheme, of all the undertaking, property and assets of the present company."

3. "The new company shall create an issue of 100,000*l.* first mortgage debenture stock, carrying interest at the rate of 5*l.* per cent. per annum, and charged by way of mortgage and as a floating security upon all its property whatsoever and wheresoever, including its uncalled capital for the time being, such stock to be secured by a trust deed in favour of trustees, such stock to be redeemable by the operation of a 2 per cent. cumulative sinking fund to be applied yearly in and after the year 1910 by the redemption of the stock by drawings at par, or by purchase when under par."

4. "Each debenture-holder of the present company shall accept, in satisfaction and discharge of his debentures of the present company, first mortgage debenture stock of the new company for a sum equal to the amount of principal and interest and bonus owing at the commencement of the winding-up upon his debentures, but, if in any case the amount so owing shall not be an exact multiple of 1*l.*, the difference shall be paid by the new company in cash, or at the option of the company such difference may be treated as being 1*l.* The debenture-holders shall accept such debenture stock in full satisfaction of all their claims, and the assets of the present company shall stand freed and discharged therefrom, and the old debentures shall be given up to the new company."

5. "Every holder of shares in the present company shall, in respect of each share held by him, be entitled to claim from the

new company, one ordinary share in the new company, with the sum of 7*s.* 6*d.* credited as paid up thereon."

6. "The new company shall not be bound to allot any shares under the last preceding paragraph, unless the member entitled thereunder, within three weeks from the time when this scheme shall be sanctioned by the Court, by writing addressed to the new company and countersigned by the liquidator, claims his allotment, and at the same time pays to the new company a sum of 3*d.* per share so claimed on account of the said liability thereon, and in view of this provision the liquidator shall, within seven days after this scheme shall be sanctioned as aforesaid, give to each member of the present company notice of the sanction thereof, and of the provisions of this clause, and such notice shall be given by circular letter sent through the post and addressed to the member at his registered address."

7. "As regards unclaimed shares the liquidator shall use his best endeavours to sell the same as and when he thinks fit, and shall divide the net proceeds of such sale rateably among the non-claiming members of the present company, and the new company shall, on the nomination of the liquidator, allot to the purchaser or purchasers the shares sold to them, credited as paid up to the extent aforesaid, and in this clause 'unclaimed shares' means any shares in the new company which members of the present company, though entitled, omit to claim within the period aforesaid."

8. "The new company shall pay all the costs, charges and expenses of and incident to the winding-up of the present company, including the costs of and incident to this scheme and carrying the same into effect."

9. "Subject to the provisions of this scheme, the new company shall take over and discharge all the liabilities of the present company, and shall indemnify the present company, its liquidator and contributories, in respect thereof."

10. "As soon as conveniently may be after this scheme becomes binding, the present company and its liquidator shall respectively execute and do all such assurances and things as may be necessary for carrying the same into effect."

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11. "Unless this scheme is duly adopted by the new company within six months after it becomes binding, the liquidator may, with the sanction of the Court, declare that the same has fallen through, and the same shall thereupon be deemed to be annulled."

12. "The liquidator may assent to any modification of this scheme, or to any conditions the Court may think fit to approve or impose."

A meeting of shareholders of the company passed a special resolution on December 29, 1899, which was duly confirmed on January 15, 1900, to wind the company up voluntarily, and appointing Mr. St. John Hodges liquidator, authorizing the liquidator to assent to the formation of the proposed new company, and to transfer the undertaking and assets of the company to the proposed company when formed, on the terms of the scheme of arrangement set out above; approving a draft agreement with the proposed company, and "that the directors and the said liquidator, or either of them, be and are hereby authorized to procure underwriting for all or any of the capital of the new company on such terms and conditions as they or he may approve, and to pay for the same out of the assets of the company."

No member of the company had expressed his dissent from the special resolutions in the manner provided by s. 161 of the Companies Act, 1862.

Contracts had been made by the liquidator with two persons who had agreed to apply for and take up all the shares in the intended company which should not be taken up by the shareholders in the existing company, in consideration of commissions amounting to 3*d.* a share on the whole 250,000 shares of the company, or 3125*l.* in the whole.

A debenture-holders' action had been commenced, and in that action an order was made directing the liquidator to hold a meeting of the debenture-holders for the purpose of ascertaining whether they approved or disapproved of the scheme. The meeting was duly held, and the requisite statutory majority of debenture-holders approved of the scheme.

The petition was presented by the company and the liquidator.

The petition was heard before Cozens-Hardy J. on March 2, 1900.

Upjohn, Q.C., and *Stewart-Smith*, for the petitioners; and *Dunham*, for shareholders and debenture-holders, in support. The scheme is one for the benefit of all parties; it has been consented to by the parties interested.

[COZENS-HARDY J. I see a great objection to the underwriting arrangement, and do not feel at all disposed to sanction any scheme which is bound up with such an arrangement.]

An underwriting agreement under which a company pays commission is perfectly legal: *Metropolitan Coal Consumers' Association* v. *Scrimgeour*. (1)

Gore-Browne, for debenture-holders and shareholders opposing, objected to the fairness of the scheme. The underwriting arrangement was one which the Court would not assist.

[He was stopped by the Court.]

Upjohn, Q.C., in reply.

COZENS-HARDY J. I am asked not merely to sanction an arrangement by which the debenture-holders take a substituted security upon the same property, which it seems to me would be merely a postponement of the payment of their debts. If that were all, it may be I should feel no difficulty in doing it. But I am asked to sanction a scheme of arrangement by way of reconstruction of the company whereby its assets and liabilities are to be transferred to a new company. Let us see what this means. It means that the company is, in a commercial sense undoubtedly, insolvent, probably in every sense insolvent, but it is proposed by this scheme that the liquidator shall give effect to arrangements which he has made in regard to underwriting under which, in round figures, 3000*l.* or thereabouts is to be paid out of the till of this insolvent company to persons who are to underwrite shares in a new company, which is not yet in existence, but which may come into existence hereafter, and this is to be done out of money which will by those payments obviously be lessened,

(1) [1895] 2 Q. B. 604.

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and which would be returned to those shareholders in the present company who may not elect to take shares in the new company.

That is an arrangement which, as at present advised, I think illegal and improper on the part of the liquidator, and I certainly cannot sanction it. I must, therefore, dismiss this petition with costs.

D. P.

C. A.

The company and the liquidator appealed. The appeal was heard on March 21, 1900.

Upjohn, *Q.C.*, and *Stewart-Smith*, for the appellants. The scheme affects only the debenture-holders, for it is intended to retain a sum sufficient to satisfy the unsecured creditors.

[VAUGHAN WILLIAMS L.J. Is an agreement to sell the assets to a company not yet in existence valid under s. 161 of the Companies Act, 1862? *Bird* v. *Bird's Patent Deodorizing and Utilizing Sewage Co.* (1)]

It is impossible to carry out such a scheme except by the machinery of forming a new company, and this is the course always adopted in such cases.

But the arrangement was really made under the Act of 1870.

The liquidator does not care now to insist on the underwriting agreements. The price of timber has risen since the resolutions were passed, and about four-fifths of the shareholders in the old company have expressed themselves willing to take shares in the new company. The resolution relating to underwriting was added at the suggestion of some shareholders. It is, no doubt, the duty of the Court to consider the interest of the shareholders, but they must be taken to know their own interest best. The underwriting commissions will not really be paid by the old company. The company cannot be carried on without new working capital, and in order to obtain that capital the shareholders and the debenture-holders think it will be worth while to pay the 3125*l.* commission. If the scheme is not carried out, the voluntary winding-up must go

(1) (1874) L. R. 9 Ch. 358.

on, and the property will be realized in the debenture-holders' action, and then in all probability the debenture-holders will not get 20*s.* in the pound, and the shareholders will get nothing at all. The payment of the underwriting commission may give them a chance of receiving something.

An agreement of this kind was in fact sanctioned by the Court in *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) and in *Burdett-Coutts* v. *True Blue (Hannan's) Gold Mine.* (2) In neither of those cases, however, does the question of illegality appear to have been raised. The liquidator is so satisfied that the proposed scheme will be carried through that, if the Court objects to the underwriting agreements, he is willing to procure their cancellation.

[LINDLEY M.R. I think we must have regard to s. 161 of the Companies Act, 1862, as well as to the provisions of the Act of 1870. It is proposed to bind the contributories as well as the debenture-holders. I think s. 161 contemplates a sale to an existing company.]

In *Postlethwaite* v. *Port Phillip and Colonial Gold Mining Co.* (1) the sale was to a new company to be incorporated. And so it was also in *In re Hester & Co.* (3)

[LINDLEY M.R. There the sale was to a trustee for an intended company.]

That would be the form of the agreement in the present case.

[LINDLEY M.R. If the liquidator is willing to undertake to pay the unsecured creditors in full and not to act upon the underwriting agreements, we will hear the respondents.]

The liquidator is ready to assent to that.

Gore-Browne, for a dissentient debenture-holder and three dissentient shareholders. The scheme is not such a scheme as is contemplated either by the Act of 1870 or by s. 161 of the Act of 1862. It is not a compromise between the old company and the debenture-holders, but it is a scheme for the formation of a new company (the existence of which is doubtful) which is to give something to the debenture-holders. The Act of 1870

(1) (1889) 43 Ch. D. 452. (2) [1899] 2 Ch. 616.
(3) (1875) 44 L. J. (Ch.) 757.

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enables the Court to bind the creditors by an arrangement with the company which is approved by a prescribed majority of the creditors.

[*Stewart-Smith* referred to *In re English, Scottish, and Australian Chartered Bank.* (1)]

It would be a strange thing if an arrangement, the principal party to which—the company which is to provide the substituted security—is not in existence, could be made binding on the creditors. The Act of 1870 does not contemplate an arrangement which is to take effect in future; it contemplates a present existing arrangement. The petitioners are in fact asking the advice of the Court whether the proposed arrangements between the old company and the new, and between the new company and the creditors, will be good arrangements.

The scheme is founded on the assumption that s. 161 of the Act of 1862 has been duly complied with, and provisions for the protection of dissentient shareholders similar to those contained in s. 161 ought to be inserted in the scheme. As it stands, a dissentient shareholder will lose all his interest in the old company unless the liquidator is able to sell his shares. A right to an allotment of shares in the new company is given to a shareholder in the old company only if he claims an allotment within three weeks from the sanctioning of the scheme by the Court. The liquidator can give away any shares which are not taken up by the old shareholders. The price to be paid to a dissentient shareholder for the purchase of his shares must be determined by agreement between him and the liquidator in the winding-up or by arbitration: *Baring-Gould* v. *Sharpington Combined Pick and Shovel Syndicate.* (2)

Stewart-Smith. No shareholder has given a notice requiring the liquidator to purchase his shares within the time prescribed by s. 161. But the liquidator is willing that the three dissentient shareholders who appear shall be treated as if they had given the notices required by s. 161, and shall have their rights under that section preserved.

Gore-Browne assented to this.

(1) [1893] 3 Ch. 385. (2) [1899] 2 Ch. 80.

LINDLEY M.R. With the modifications which have been discussed and which are now assented to by the liquidator, I think we may sanction the proposed scheme. I do not take the view which Cozens-Hardy J. appears to have taken that it is not an honest scheme; I am inclined to think it is. But it has been put forward in a very embarrassing form. It is a compound of two distinct things—an arrangement with the creditors, and a reconstruction of the company. I agree with Cozens-Hardy J. in thinking that the Court ought to be very careful about giving its sanction to such agreements as these underwriting agreements, which involve the payment of a commission out of the assets of the company. It would be very like turning the Court into a company promoter. But that objection is now removed by the undertaking of the liquidator not to act upon the last resolution, and to procure the cancellation of those agreements.

Another formidable objection has been taken by Mr. Gore-Browne, namely, that the scheme deprives the dissentient shareholders of their statutory right under s. 161 of the Companies Act, 1862. But that objection also has been got rid of by the undertaking of the liquidator that those shareholders shall be treated as if they had given the proper notices, and shall retain the rights given to them by that section. The liquidator has also undertaken to pay the unsecured creditors in full. But for these modifications, we could not have given our sanction to a scheme which would have deprived the dissentient shareholders of their statutory rights.

RIGBY L.J. and VAUGHAN WILLIAMS L.J. concurred.

The following is the substance of the order as drawn up by the registrar:—

The liquidator accepting the following conditions imposed by the Court, and undertaking to carry the same out, namely, (1.) to pay the unsecured creditors of the old company in full out of the assets in his hands before delivering the same to the new company, (2.) not to act upon the last resolution passed at the meeting of shareholders, but to procure the underwriting agreements to be cancelled, (3.) that the three respondent shareholders shall have three days within which to elect whether they will dissent from the special resolutions

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passed by the company or not, and if within that time they elect to dissent, they shall be treated as entitled to all the statutory rights of dissentient members under ss. 161 and 162 of the Companies Act, 1862, who have given proper notice of dissent, the Court allows the appeal, and subject to the said undertaking doth hereby sanction the scheme of arrangement, and doth hereby declare the same to be binding upon the debenture-holders and contributories of the company, and also on the liquidator.

Solicitors: *Mayo & Co.; Ashurst, Morris, Crisp & Co.; Beaumont, Son & Rigden.*

W. L. C.

C. A. 1900 *March* 22, 23, 26.

THOMSON *v.* LORD CLANMORRIS.

[1898 T. 2006.]

Statute of Limitations—Company—Director—Untrue Statements in Prospectus—Action by Shareholder for Compensation—Accruer of Cause of Action—Directors Liability Act, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

Sect. 3 of the Civil Procedure Act, 1833, which provides that "all actions for penalties, damages or sums of money given to the party grieved by any statute" must be brought within two years after the cause of action, applies only to penal actions—i.e., actions for penalties, or damages or sums of money in the nature of penalties, and does not apply to an action by a shareholder in a company, under s. 3 of the Directors Liability Act, 1890, to recover from the directors compensation for loss or damage sustained by him by reason of untrue statements in the prospectus of the company on the faith of which he subscribed for his shares.

Semble, that the cause of action in such a case accrues at the time when the shares are subscribed for, and that the action must, under the statute 21 Jac. 1, c. 16, be brought within six years from that date.

Decision of Kekewich J., [1899] 2 Ch. 523, affirmed.

APPEAL against a decision of Kekewich J. (1)

The action was brought by Joseph Thomson, a shareholder in the British Goldfields of West Africa, Limited, a company in liquidation, against Lord Clanmorris, Colonel A. Bravo, B. C. Hargreaves, J. K. D. Mackenzie, and J. W. Wilson, the directors of the company, and Sir Alfred Kirby, its promoter, claiming compensation under the Directors Liability Act, 1890, and damages, on the ground that untrue statements

(1) [1899] 2 Ch. 523.

were contained in the prospectus of the company, on the faith of which the plaintiff had subscribed for shares.

On August 22, 1895, the defendant directors issued a prospectus inviting applications for shares. It stated, inter alia—(*a*) that the company had been formed to acquire and work valuable concessions for gold, timber, &c., in the district of Appolonia, in the Gold Coast Colony, of about 7000 square miles in extent. The plaintiff said that on the faith of the statements in the prospectus he, on August 28, 1895, applied for 100 shares of 1*l.* each in the company and paid 12*l.* 10*s.*, being 2*s.* 6*d.* per share, on application, in accordance with the terms of the prospectus. On August 29 100 shares were allotted to him, and he paid the further sum of 37*l.* 10*s.* on allotment. He eventually paid for his shares in full, his last call of 25*l.* being paid to the liquidator in November, 1898. The plaintiff alleged (inter alia) that the concessions, instead of being 7000 square miles in extent, were only about 700 in extent.

On January 12, 1898, an order was made to wind up the company. On December 9, 1898, the plaintiff issued the writ in the action, claiming the relief above stated.

The defendant directors denied the plaintiff's allegations, and submitted that the statement of claim disclosed no cause of action against them. They also contended that in respect of each of the statements in the prospectus they had complied with the requirements of s. 3 of the Directors Liability Act, 1890, so as to absolve themselves from liability. They also insisted that, as the action had not been commenced within two years after the plaintiff's cause of action (if any) arose, his claim was barred by s. 3 of the Civil Procedure Act, 1833.

Sir Alfred Kirby did not appear in the action, and he had died before the hearing of the appeal.

Kekewich J. held that s. 3 of the Act of 1833 did not apply, and that the action was not barred by lapse of time. And he held that the statements in the prospectus were untrue, and that the defendants had not shewn that they had reasonable ground to believe the statements to be true. And his Lordship gave judgment for the plaintiff for 100*l.*, with costs.

The defendant Wilson appealed.

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Lawson Walton, Q.C., and *T. Willes Chitty*, for the appellant. This action comes within the words of s. 3 (1) of the Civil Procedure Act, 1833. It is an action "for damages or sums of money given to the party grieved" by statute, i.e., by

(1) Sect. 3: "All actions of debt for rent upon an indenture of demise, all actions of covenant or debt upon any bond or other specialty, and all actions of debt or scire facias upon any recognizance, and also all actions of debt upon any award where the submission is not by specialty, or for any fine due in respect of any copyhold estates, or for an escape, or for money levied on any fieri facias, and all actions for penalties, damages, or sums of money given to the party grieved, by any statute now or hereafter to be in force, that shall be sued or brought at any time after the end of the present session of Parliament, shall be commenced and sued within the time and limitation hereinafter expressed, and not after; that is to say, the said actions of debt for rent upon an indenture of demise, or covenant or debt upon any bond or other specialty, actions of debt or scire facias upon recognizance, within ten years after the end of this present session, or within twenty years after the cause of such actions or suits, but not after; the said actions by the party grieved, one year after the end of this present session, or within two years after the cause of such actions or suits, but not after; and the said other actions within three years after the end of this present session, or within six years after the cause of such actions or suits, but not after; provided that nothing herein contained shall extend to any action given by any statute where the time for bringing such action is or shall be by any statute specially limited."

By s. 3 of the Directors Liability Act, 1890, "(1.) Where after the passing of this Act a prospectus or notice invites persons to subscribe for shares in or debentures or debenture stock of a company, every person who is a director of the company at the time of the issue of the prospectus or notice, and every person who having authorized such naming of him is named in the prospectus or notice as a director of the company or as having agreed to become a director of the company either immediately or after an interval of time, and every promoter of the company, and every person who has authorized the issue of the prospectus or notice, shall be liable to pay compensation to all persons who shall subscribe for any shares, debentures, or debenture stock on the faith of such prospectus or notice for the loss or damage they may have sustained by reason of any untrue statement in the prospectus or notice, or in any report or memorandum appearing on the face thereof, or by reference incorporated therein or issued therewith, unless it is proved (inter alia)—

"(*a*) With respect to every such untrue statement not purporting to be made on the authority of an expert, or of a public official document or statement, that he had reasonable ground to believe, and did up to the time of the allotment of the shares, debentures, or debenture stock, as the case may be, believe, that the statement was true."

s. 3 of the Directors Liability Act, 1890, which makes the defendants liable to pay to the plaintiff, who has subscribed for shares in the company on the faith of the untrue statements contained in the prospectus, compensation for the loss or damage which he has sustained.

If the limitation of two years prescribed by the Act of 1833 does not apply the action could be brought at any time within twenty years, or, at any rate, if the statute 21 Jac. 1, c. 16, applies, within six years. This would be such a serious liability to impose on directors that, if the language of s. 3 of the Act of 1833 is apt, the Court will incline to hold that it applies. The object of s. 3 of the Act of 1890 was to revive the old form of action against directors for negligence which was put an end to by *Derry* v. *Peek*. (1) The Act was recently considered by this Court in *Greenwood* v. *Leather Shod Wheel Co.* (2) Sect. 3 of the Act of 1833 applies to every action for damages under a statute, unless the statute contains an express enactment to the contrary. The only case which throws any light on s. 3 is *Robinson* v. *Currey* (3), and it shews that the expression "party grieved" is not a technical term, but is used in the ordinary sense of the words. "Damages" is defined in Co. Litt. vol. 2, 257 a, as "the recompense that is given by the jury to the plaintiff for the wrong the defendant hath done unto him." This action is founded upon a statutory liability: *Cork and Bandon Ry. Co.* v. *Goode* (4); and the statute 21 Jac. 1, c. 16, does not apply. It was not intended by s. 3 of the Act of 1890 to give a new kind of action on the case, but only to restore the form of action for negligence which was familiar before *Derry* v. *Peek*. (1)

[VAUGHAN WILLIAMS L.J. No one has ever suggested that an action under 52 Hen. 3, c. 4, for excessive distress must be brought within two years. It has always been supposed that the limit was six years.]

The Act of 1833 applies to such an action, and to every action for damages brought under a statute. The compensation given by the Act of 1890 is only the measure of the damages—the

(1) (1889) 14 App. Cas. 337.
(2) Ante, p. 421.
(3) (1881) 7 Q. B. D. 465.
(4) (1853) 13 C. B. 826.

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equivalent for the loss or damage sustained. The "party grieved" is the person who sustains the loss at which the statute is aimed.

[VAUGHAN WILLIAMS L.J. There is a distinction between an action brought on a statute and an action given by a statute: *Cork and Bandon Ry. Co.* v. *Goode.* (1)]

The expression in s. 3 of the Act of 1833, "damages or sums of money given to the party grieved," has been held by Kekewich J. to be controlled, on the ejusdem generis principle, by the word "penalties." It is submitted that this is a wrong construction of the section, and that it must be treated as intended to cover every form of action having a statutory origin. To say that there is no limit to the time within which an action may be brought for damages by way of compensation for injury sustained is opposed to the course of legislation. For instance, in the Employers' Liability Act, 1880 (43 & 44 Vict. c. 42), s. 4, an action to recover damages for injury sustained must be commenced within six months. So in the Workmen's Compensation Act, 1897 (60 & 61 Vict. c. 37), a time is limited for taking proceedings. Originally, while the bill was passing through Parliament there was no limitation in it, but at the last moment the omission was discovered and a limitation was inserted. The argument that s. 3 of the Act of 1833 must be construed on the ejusdem generis rule was urged in *Cork and Bandon Ry. Co.* v. *Goode* (2), but the Court declined to give it that narrow construction. It is, therefore, submitted that the section extends to the present action.

Then the next question is, When does the right of action for damages for misrepresentation in a prospectus accrue? It is submitted that it accrues either when the wrongful act is committed, i.e., when the prospectus is issued, or at any rate when the subscription is paid by an applicant for shares on the faith of the prospectus, and the money is thus wrongfully obtained from him: *Gibbs* v. *Guild.* (3) The cause of action is then complete, and his damage is measurable by the loss he has sustained through taking the shares with the consequent burden

(1) 13 C. B. 826.
(2) 13 C. B. 833, 835.
(3) (1882) 9 Q. B. D. 59, 70.

and responsibility. It was not intended by the Act of 1890, s. 3, that a shareholder should be allowed to wait for an indefinite period until a call is made and his shares depreciated; that is to say, he must not wait to bring his action until his shares become onerous: otherwise he may wait for an indefinite period until damage ensues.

[VAUGHAN WILLIAMS L.J. May it not be said that the time within which the action must be brought begins to run from the date of the neglect by the directors of their statutory duty?]

The principle as laid down in *Darley Main Colliery Co.* v. *Mitchell* (1), following *Bonomi* v. *Backhouse* (2), is that the cause of action begins to run from the date of the wrongful act. If the act is not wrong in itself apart from the damage, then the cause of action begins to run from the date of the damage, for in that case there is no wrongful act until the damage happens: see also *Spoor* v *Green* (3), which is a clear authority that a man who has taken shares must be taken to have known what their value was, and that there is nothing unreasonable in saying that he must have brought his action the moment he took the shares, and not wait to see whether they turned out to his advantage or not. To measure the amount of damage in an action of deceit against directors in respect of shares taken under a false prospectus, the shares are not to be taken at their market value at the time of allotment, but their value must be ascertained by the light of subsequent events, including, if the company is in liquidation, as it is here, the result of the winding-up: Buckley on Companies, 7th ed. p. 143; *Peek* v. *Derry* (4); *Arkwright* v. *Newbold* (5); *Twycross* v. *Grant* (6); *Arnison* v. *Smith*. (7) The expression "the party grieved" in s. 3 of 3 & 4 Will. 4, c. 42—that is, the person having the cause of action—means a person who has sustained a legal loss or liability by an act done in respect of which the damages are given. The cause of action is the breach of duty—the issuing of the untruthful prospectus, and the damages run from that

(1) (1886) 11 App. Cas. 127, 144.
(2) (1858) E. B. & E. 622.
(3) (1874) L. R. 9 Ex. 99, 109.
(4) (1887) 37 Ch. D. 541, 590.
(5) (1881) 17 Ch. D. 301.
(6) (1877) 2 C. P. D. 469.
(7) (1889) 41 Ch. D. 348, 363.

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time: *Howell* v. *Young*. (1) The damages accrued at any rate once for all when the shares were subscribed for.

[VAUGHAN WILLIAMS L.J. referred to *Godefroy* v. *Jay* (2); Mayne on Damages, 6th ed. p. 484.]

Renshaw, Q.C., and *George Henderson*, for the plaintiff. The cause of action cannot be either the issuing of the prospectus or the subscription for the shares; it must accrue when the loss is sustained. Sect. 3 of the Act of 1890 does not in direct terms give a right of action, but it declares a liability to indemnify the person who has sustained a loss. It declares directors and others liable to indemnify—to pay compensation to—all persons who subscribe for shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus. The compensation is for loss or damage which has been sustained, not for prospective loss. There can therefore be no right of action until the loss is sustained.

There are some statutes by which a right of action is given expressly, e.g., the Copyright Acts (8 Geo. 2, c. 13; 7 Geo. 3, c. 38). But that is not so in the Act of 1890. It might be impossible to tell until the action was brought whether any loss had been sustained by the shareholder. The Act does not say when or how the action is to be brought.

But it is submitted that s. 3 of the Act of 1833 does not apply to such an action as this. It applies to all actions by a party grieved for penalties, or damages or sums of money in the nature of penalties. An action brought under the Act of 1890 is for compensation—that is, indemnity, which is not in the nature of a penalty. The cause of action does not arise until the demand for indemnity is made. The prospectus cannot be said to be operative until some consequence flows from it: *Darley Main Colliery Co.* v. *Mitchell*. (3)

The distinction between a penalty and damages is illustrated by *Saunders* v. *Wiel* (4) and *Adams* v. *Batley*. (5)

T. Willes Chitty, in reply.

(1) (1826) 5 B. & C. 259, 264; 29 R. R. 237.
(2) (1831) 7 Bing. 413; 33 R. R. 528.
(3) 11 App. Cas. 127.
(4) [1892] 2 Q. B. 321.
(5) (1887) 18 Q. B. D. 625.

LINDLEY M.R. The point raised on this appeal is a new one to us all, and no doubt there is some difficulty about it.

In construing s. 3 of the Act of 1833, as indeed in construing any other statutory enactment, regard must be had not only to the words used, but to the history of the Act, and the reasons which led to its being passed. You must look at the mischief which had to be cured as well as at the cure provided. And when we look at the state of the law before the Act of 1833 we can see pretty plainly what was the mischief at which it was aimed. There were certain causes of action as to which there was no defined time of limitation. Some of them are enumerated in the earlier part of s. 3; for instance, "actions of debt upon any bond or other specialty," and others which are there mentioned. They were not provided for by the then existing Statutes of Limitations, and they are brought in. That was the first defect. There was another class of actions as to which there was no definite limitation of time, namely, "actions for penalties, damages or sums of money given to the party grieved" by various Acts of Parliament, by way of penalty or punishment; not by way of compensation to the person injured, but where, as was pointed out by Lord Esher M.R. when commenting in *Saunders* v. *Wiel* (1) upon *Adams* v. *Batley* (2), punishment was the object; and where the money to be paid, whether it was called penalty, or damage or sum of money, was not assessed with the view of compensating the plaintiff, although he might put some of it in his pocket. That is the class of action which was contemplated by the latter part of s. 3. In other words, they were what are popularly called "penal actions." We arrive at this from the history of the Act, and from a knowledge of the then state of the law and the defect which was to be cured.

Now, taking that as our guide, it is, I think, obvious that an action under the Directors Liability Act, 1890, does not come within that class of action. It may be hypercritical, but even the words if critically looked at do not cover such an action as this. The Directors Liability Act does not in terms give an action or damages or a penalty. Nothing is given by

(1) [1892] 2 Q. B. 321. (2) 18 Q. B. D. 625.

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the Act. What you find in the Directors Liability Act is a liability imposed—a liability to make compensation—and the money payable is obviously a compensation to the plaintiff for the loss which he has sustained. It must be estimated and awarded with reference to that. It does not in the least resemble a "penalty, damages or sum of money" imposed by statute as a punishment without reference to the injury sustained by the person who sues for it. Therefore, whether you look at the language of the two Acts, or whether you look at the good sense of the thing and the history of the legislation, it seems to me plain (although I admit that at first sight there is a little difficulty in the language) that this is not an action "for a penalty, damages or sum of money" within s. 3 of the Act of 1833.

That brings me to the next question—what time (if any) is limited. If we get rid of the two years' limitation, we may reserve that point for future consideration. My own impression is that, under the Directors Liability Act, if we were in the old days of pleadings not under the Judicature Acts, an action on the case for breach of duty would be the proper remedy, and six years would be the period of limitation. But we need not decide that point now, because, whether the period is twenty years or six years, this writ has been issued in ample time. In other words, no Statute of Limitations can be pleaded to this action having regard to the dates, the cause of action having arisen (if at all) at the outside three years before the issue of the writ, which was in December, 1898. If this be so, we need not really trouble ourselves about the cause of action or the exact time at which it accrued. But, as the point has been argued, and it is a new one, I may say that in my own view Mr. Willes Chitty is right, and that the cause of action accrues and the time begins to run from the date when the shares were subscribed for. I arrive at that conclusion by what I may call an exhaustive process. I cannot adopt Mr. Renshaw's suggestion that you must wait till the company is wound up to see what loss is sustained. The company may never be wound up, and yet an action may be brought. Nor do I think it would be in accordance with the ordinary rules of

procedure and the ordinary views respecting the Statute of Limitations to say that a separate cause of action accrues every time the shareholder has to pay a call. That would be foreign to our habits of thought, and I cannot help thinking that the true view is, that the limitation is six years by analogy to the old form of action, and that the time begins to run when the plaintiff subscribes for and takes shares on the faith of the untrue statements in the prospectus. This is my own view. But it is sufficient to say that the only point we have to decide is whether this particular action is barred by any Statute of Limitations. In my opinion it is not. Therefore we must hear the case on the merits.

RIGBY L.J. I agree that there is no statutory limitation which applies to the present case.

VAUGHAN WILLIAMS L.J. I agree. But, as the point is a new one, I think it is my duty to add a few words. One must consider what is really the nature of the enactment contained in s. 3 of the Directors Liability Act, 1890. And it seems to me that, though that section does not in form give a new action, though it only says that directors and others "shall be liable to pay compensation to all persons who shall subscribe for any shares on the faith of the prospectus for the loss or damage they may have sustained by reason of any untrue statement in the prospectus," yet what the section really does is to give a new action on the case. It creates a new negative duty. The directors or promoters, or whatever other class is included in this section, have cast upon them a new duty in respect of prospectuses and similar documents. Speaking generally, one may say that the Act creates a new statutory duty of accuracy —a new statutory duty to abstain from inaccurate and untrue statements, and then in effect gives a new action on the case to those persons who may have been injured by the neglect of that statutory duty. It seems to me, therefore, that this case is provided for by the statute 21 Jac. 1, c. 16. The action is an action on the case, and if so of course the six years' limitation would apply.

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But it is said that this is not an action on the case, but an action on the statute, and *Cork and Bandon Ry. Co.* v. *Goode* (1) is relied on. But it must be remembered that there the action was for a statutory debt, and the sole question was whether that debt was, within the terms of s. 3 of the statute of James, "grounded on a contract without specialty." It does not seem to me that that decision is really material to the case now before us. Maule J. pointed out that there is a difference between an action which is given by a statute and an action on the statute. *Cork and Bandon Ry. Co.* v. *Goode* (1) was an action of debt on the statute. And, as I have already said, the only question there really was whether the action came within the words of s. 3 of the statute of James. In the present case it seems to me that a new duty of accuracy in respect of the preparation and issue of prospectuses is created, and an action on the case is given to those persons who are injured by the breach of that duty.

It is said that this is a new form of statute. But I do not think that in substance this statute differs from the Statute of Marlbridge (52 Hen. 3, c. 1 and c. 4), by which, in respect of not only illegal but irregular and excessive distresses, it is provided that, notwithstanding the liability to punishment, "nevertheless sufficient and full amends shall be made to them that have sustained loss by such distresses." So here it seems to me that the effect of s. 3 of the Act of 1890 is that amends shall be made to those who have sustained loss by being induced to subscribe for shares by reason of misstatements in the prospectus.

Under these circumstances it is not necessary to decide the other question—from what time the statute is to run. But I agree with the Master of the Rolls that the statute does not run from the sustaining of each item of damage, nor from the time of the wrongful act, the preparation or the issue of the document containing the untrue statements. It cannot run from that time by reason of two well-known principles of law which apply to all Statutes of Limitations. A Statute of Limitations cannot begin to run unless there are two things

(1) 13 C. B. 826.

present—a party capable of suing and a party liable to be sued. And under this Act of 1890 it is plain that, inasmuch as the compensation is given to those persons who have subscribed for shares in respect of the damage sustained by them thereby, there cannot be any cause of action whatever until there has been a subscription for the shares.

That, I think, decides the first point, that the statute does not run from the time of the preparation or issue of the untrue document.

Then it is said that, even if that is not so, inasmuch as the compensation is to be given for the loss, a fresh cause of action must accrue as each fresh item of loss accrues. It seems to me untrue to say that the whole loss is not assessable the moment that the subscription for the shares has been made upon the faith of the prospectus. Generally speaking, it is obvious that you could assess the whole loss by going into the market and selling the shares. It is said that in some instances the shares might not be saleable, or they might even carry such a liability for calls that you might have to pay a transferee to relieve you of the shares. It is moreover suggested that, if there was a winding-up, the transferor might be liable to be placed upon the B list of contributories for twelve months after the sale of the shares. But all those matters, supposing they appear in any case, although they may not be capable of perfectly exact computation of the damage, are clearly so capable of some computation that, according to the well-established principles of English law in favour of finality of litigation, there would be amply sufficient evidence and means of proof such as would not only make it the duty of the shareholder to claim in respect of these more difficult matters at the time when he brings his action, but also to debar him from the right to bring any further action if he did not so claim.

The action was then heard on its merits.

Without calling on the plaintiff's counsel,

THE COURT dismissed the appeal, being of opinion that the prospectus contained untrue statements as to material facts,

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and that, though the appellant honestly believed them to be true, and had been himself deceived, he had not shewn that he had reasonable ground for believing the statements to be true.

Solicitors: *Morten, Cutler & Co.; Herbert Toomer.*

W. L. C.

C. A. 1900 *March* 28.

In re CRUDDAS. CRUDDAS *v.* SMITH.

[1899 C. 615.]

Power of Appointment—Extent of Exercise—Power to appoint Invested Fund—Appointment of Specified Sums of Cash—Increase in Value of Investments.

A father by his will gave to trustees a sum of 30,000*l.* (to be invested as he directed), upon trust to pay the interest and annual proceeds thereof to his daughter during her life, and after her death the same sum, together with the interest and annual proceeds thereof, was to be held on such trusts as the daughter should appoint in favour of her children or grandchildren, with a trust over in default of appointment.

The daughter by her will recited verbatim the gift in the father's will, and then, in exercise of the power, appointed that "the said sum of 30,000*l.*, together with the interest and the annual proceeds thereof, by the said will of my father to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as aforesaid," should after her death be held by the trustees of her father's will upon trust as to 1000*l.* "part thereof" for her daughter Emmeline; upon trust as to five sums of 1000*l.*, 4000*l.*, 6000*l.*, 6000*l.*, and 6000*l.* respectively, each of which was described as "other part of the said sum of 30,000*l.*," on trust for five others of her children respectively, and upon trust as to another sum of 6000*l.*, which was described as "the residue of the said sum of 30,000*l.*" for her other child. At the time of her death the securities on which the 30,000*l.* had been invested were worth 39,000*l.*:—

Held, by Kekewich J., that only the sum of 30,000*l.* was effectually appointed by the will, and that the excess of 9000*l.* must go as in default of appointment.

Held, by the Court of Appeal, that the testatrix was dealing with the fund as an invested fund, and that the whole of it was appointed in the proportions indicated by her will.

APPEAL against a decision of Kekewich J. upon an originating summons issued for the determination of the effect and extent of an appointment made by the will of Jane Maria Smith, widow.

The appointment was made in exercise of a power conferred upon her by the will of George Cruddas (her father), who died on April 7, 1879. He by his will, dated May 9, 1878, gave to his trustees therein named "two sums of 30,000*l.* each, to be respectively raised or appropriated as soon as conveniently may be after my decease, with interest in the meantime after the rate of 4*l.* per centum per annum computed from my decease, and such interest shall be paid half-yearly and shall be applied in such or the like manner as hereinafter directed with respect to the annual proceeds of such sums after the appropriation thereof, and the said sums when raised or appropriated to be invested pursuant to the power of investment hereinafter contained and to be respectively held upon the trusts following, that is to say, as to one of the said two sums of 30,000*l.* upon trust during the life of my daughter Jane Maria Smith to pay the interest and annual proceeds thereof unto her" for her separate use without power of anticipation. And from and after her decease "the same sum, together with the interest and annual proceeds thereof," should be held upon such trusts and in such manner as the daughter should by deed or will appoint, "so only that every such appointment be made in favour of a child or children of my same daughter who shall have attained or shall attain the age of twenty-one years or who shall marry under that age, or of a grandchild or grandchildren of my same daughter, and in default of such appointment upon trust for the child, if only one, or all the children equally if more than one, of my same daughter who shall be living at my decease or born afterwards, and being a son or sons shall live to attain the age of twenty-one years or dying under that age shall leave issue surviving, or being a daughter or daughters shall live to attain that age or be previously married, and for their respective executors administrators and assigns. But no child of my same daughter in favour of whom or of whose issue an appointment shall be made . . . . shall participate in the unappointed fund without the appointed share being brought into distribution, unless my same daughter shall declare a contrary intention in writing."

C. A. 1900

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The daughter (then a widow) by her will, dated October 18, 1892, recited verbatim the above gift in her father's will and his death, and then proceeded as follows :—

"Now therefore, in exercise of the power for this purpose given to me by the said will of my father and of every or any other power hereunto enabling me, I do by this my last will and testament in writing direct and appoint that the said sum of 30,000*l.* together with the interest and the annual proceeds thereof by the said will of my father directed to be held in trust for me, my children and grandchildren as therein particularly mentioned, and over which I have such power of appointment as aforesaid, shall from and after my decease remain and be and that the trustees or trustee for the time being of the said will of my father shall stand possessed thereof, upon trust and to the intent that the said sum of 30,000*l.*, together with the interest and annual proceeds thereof, shall be held by the said trustees or trustee upon the trusts hereinafter declared and contained of and concerning the same, that is to say, as to the sum of 1000*l.* part thereof in trust for my daughter Emmeline Smith absolutely. But if she shall die in my lifetime then in trust for all her children or any her child who being male shall attain the age of twenty-one years, or being female shall attain that age or marry, and if more than one in equal shares. And as to another sum of 1000*l.* (other part of the said sum of 30,000*l.*)" upon similar trusts in favour of the testatrix's daughter Ada Smith and her children. "And as to the sum of 4000*l.* (other part of the said sum of 30,000*l.*)" upon trusts for the benefit of George Cruddas Smith, a son of the testatrix, and his children. "And as to the sum of 6000*l.* (other part of the said sum of 30,000*l.*)" upon similar trusts in favour of Percy Smith (another son of the testatrix) and his children. "And as to another sum of 6000*l.* (other part of the said sum of 30,000*l.*)" upon similar trusts in favour of Charles Stanley Smith, another son of the testatrix, and his children. "And as to another sum of 6000*l.* (other part of the said sum of 30,000*l.*)" upon similar trusts in favour of Arthur Watson Smith, another son of the testatrix, and his children. "And as to another sum of 6000*l.* (being the remainder of the said

sum of 30,000*l.*) " upon similar trusts in favour of Albert Smith, another son of the testatrix, and his children.

The testatrix died on January 23, 1899. All her seven children mentioned in her will survived her, and they had all attained twenty-one. She had had no other children.

At the time of her death the investments which represented the 30,000*l.* were worth about 39,000*l.*

The plaintiffs were the surviving trustees of the father's will.

The defendants were the seven children of the testatrix.

Kekewich J. made an order declaring that upon the true construction of the will of the testatrix the sum of 30,000*l.* sterling, and no more, was thereby effectually appointed amongst the defendants, and that the trust funds, in excess of the sum of 30,000*l.*, ought to go as in default of appointment amongst all the children of the testatrix, subject to their bringing their appointed shares into hotchpot.

Those four sons of the testatrix to whom 6000*l.* each was appointed appealed.

Renshaw, Q.C., and *E. Ford*, for the appellants. On the true construction of the will of the testatrix she has appointed the whole invested fund in the proportions indicated by her, and there is nothing left to go in default of appointment.

[They were stopped by the Court.]

Wright Taylor (*Warrington, Q.C.*, with him), for the other children of the daughter. The appointment, e.g., to the daughter Emmeline is of 1000*l.*—i.e., 1000 sovereigns, neither more nor less. There is nothing to indicate that the testatrix intended to give a fractional part of a larger sum. The mere fact that the 1000*l.* is described as "part of the 30,000*l.*" does not make the gift to be a gift of an aliquot part of the 30,000*l.*: *Booth* v. *Alington* (1); *De Lisle* v. *Hodges*. (2) It is true that in *Booth* v. *Alington* (1) there was no gift of residue. But can the fact that in the appointment of the last 6000*l.* it is described as "the remainder" of the 30,000*l.* make any difference? It has not been suggested that the whole of the residue goes to

(1) (1856) 6 D. M. & G. 613. (2) (1874) L. R. 17 Eq. 440.

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the last appointee. The last appointment is as specific as those which precede it: *Easum* v. *Appleford.* (1) The increase in the value of the investments of the 30,000*l.* was not present to the mind of the testatrix, and no intention to appoint the whole fund can be discovered.

H. Fellows, for the trustees of the father's will.

LINDLEY M.R. In my opinion it is only necessary to look at the will of the father conferring the power of appointment, and the will of the daughter exercising the power, in order to see what her intention was. Her father by his will gave her power to appoint a sum of 30,000*l.*, which was to be invested in the manner directed by his will, together with the interest thereof. The power is in effect to appoint an invested fund which is to produce interest. Then the daughter in her will recites in its exact words the will of her father, and she says (and this to my mind is the key to the whole case), "In exercise of the power given to me by the said will of my father, I direct that the said sum of 30,000*l.*, together with the interest and annual proceeds thereof, by the said will of my father directed to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as aforesaid," shall from and after her death remain and be, and the trustees of her father's will shall stand possessed thereof, "upon trust that the said sum of 30,000*l.*, together with the interest and annual proceeds thereof, shall be held by the said trustees upon the trusts hereinafter declared of and concerning the same, that is, as to the sum of 1000*l.* part thereof," and so on. What does the testatrix mean by that? She is dealing with an invested fund of 30,000*l.*, and in my opinion each appointment which she makes of a specified sum is an appointment of that sum as an invested fund. When she appoints a sum of 1000*l.* she means an invested fund of 1000*l.*—a sum of 1000*l.* as it is invested. It happens that the 1000*l.* as invested is now worth more than 1000*l.* Then when she appoints the last sum of 6000*l.* she describes it as "the remainder of the said sum of 30,000*l.*" It is plain to my mind that she was

(1) (1840) 5 My. & Cr. 56.

dealing with the 30,000*l.* as an invested fund, and that she did not intend to leave any part of it unappointed. The appeal must be allowed, and it must be declared that the appointees take the invested fund in the proportions indicated by the testatrix.

RIGBY L.J. I am of the same opinion. The father by his will directed the sum of 30,000*l.* to be invested, and then he gave power to his daughter to appoint "the same sum, together with the interest and annual proceeds thereof," in the manner which he mentions. It is, I think, clear that he intended to give her power to appoint the investments of the 30,000*l.* It is, I think, equally clear that the daughter intended to appoint everything over which her father had given her a power of appointment—to appoint the whole of the invested fund. I decline to consider the authorities which have been cited, because the language of the instruments there in question was totally different from that which we have now to construe.

VAUGHAN WILLIAMS L.J. I agree.

Solicitors: *Rooke & Sons, for Barrow & Smith, Manchester; King, Wigg & Co., for George Armstrong & Sons, Newcastle-upon-Tyne.*

W. L. C.

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1899
COZENS-HARDY J.
June 6, 19.
C. A.
1900
March 13, 14.

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[1898 D. 848.]

Mortgage—Transfer of Mortgage without Notice to Mortgagor—Sale of Mortgaged Property by Mortgagor and original Mortgagee as unincumbered—Payment of Mortgage Debt by Mortgagor to original Mortgagee—Omission to call for Title Deeds—Constructive Notice of Transfer.

The owner of real estate mortgaged it in fee to his solicitor, who shortly afterwards transferred the mortgage to a client, the title deeds and the mortgage deed, on which the transfer was indorsed, being handed over to the transferee. The transferee omitted to give notice of the transfer to the mortgagor, and he was ignorant of it. Afterwards the property was sold and was conveyed as free from incumbrances by the mortgagor and the original mortgagee to the purchaser by a deed (prepared by the solicitor) which contained false recitals, the mortgage and the transfer of it being suppressed.

The purchase-money was received by the solicitor, who out of it retained the mortgage debt and interest, and paid over the balance to his client, the mortgagor. The purchaser had no notice of the mortgage. The mortgagor did not call for the title deeds or the mortgage deed when the mortgage was paid off, but left everything to his solicitor, the original mortgagee, and signed what he told him to sign. The solicitor paid the interest on the mortgage debt to the transferee until he absconded, when the fraud was discovered. The purchaser then claimed to hold the property free from the mortgage:—

Held, by Cozens-Hardy J., that, as the mortgagor had been a party to the false recitals in the conveyance to the purchaser, and had not called for the title deeds when the mortgage debt was retained by the solicitor out of the purchase-money, he could not claim as against the transferee the benefit of the ordinary rule that payments made by a mortgagor to a mortgagee without notice of a transfer are good as against the transferee; and that the purchaser had no better equity against the transferee.

Semble, the negligence of a mortgagor, who is entitled on payment off of the mortgage to have the mortgage deed and the title deeds delivered to him and who omits to ask for them, is greater than the negligence of a transferee of the mortgage who omits to give notice of the transfer to the mortgagor.

Held, by the Court of Appeal, that, inasmuch as the evidence shewed the mortgagor had placed himself entirely in the hands of his solicitor, and constituted him his general agent in the transactions, the knowledge of the solicitor must be imputed to him, and he must be treated as having had notice of the transfer of the mortgage; and consequently the payment of the mortgage debt to the solicitor was not effectual as against the

transferee, and the mortgage must be treated as still subsisting in her favour, and the purchaser must hold the property subject to it, but with a right to be indemnified against it by the mortgagor.

TRIAL OF ACTION.

The question in the action was who was to suffer by reason of the fraud of a solicitor named Dent. The material facts were as follows.

By a deed dated July 14, 1886, some land at Harlow in Essex was conveyed to Dent in fee.

By a deed dated March 24, 1892, Dent conveyed to the defendant Winch, a builder, a portion of this land, subject to some building restrictions, and Dent in the usual way acknowledged Winch's right to the production of the conveyance of July 14, 1886. Winch, who was financed by Dent, built some houses on part of the land sold to him, and by a deed dated January 11, 1893, Winch mortgaged this part of the land and the houses on it to Dent to secure 350*l.* with interest at 5*l.* per cent. per annum. On January 16, 1893, Dent transferred to Miss Ellman (a client of his) the mortgage debt of 350*l.* and the mortgaged property, subject to redemption. Miss Ellman received and had since retained in her own possession the conveyance to Winch, and the mortgage from Winch to Dent, the transfer from Dent to herself being indorsed thereon. She did not give notice of the transfer to Winch, and Winch was ignorant of the transfer. Dent paid Miss Ellman interest on the mortgage debt until 1898, when he absconded. On his disappearance, the following facts were discovered.

By a deed dated September 15, 1893, and made between Dent of the first part, Winch of the second part, and Mrs. Dixon, the plaintiff, of the third part, after a recital that ". . Dent being seised of the land hereinafter described and conveyed for an unincumbered estate of inheritance in fee simple in possession some time since agreed to sell the same to . . Winch at the price of 100*l.*, but no conveyance thereof has been executed," and a recital that Winch had erected three houses on the land and had agreed to sell the same to Mrs. Dixon at the price of 685*l.*, it was witnessed that, in

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consideration of 100*l.* paid by the plaintiff to Dent and of 585*l.* paid by the plaintiff to Winch, Dent and Winch conveyed to the plaintiff part of the land which was comprised in the mortgage of January 11, 1893. This conveyance contained no reference to the mortgage, and there was no covenant for production of deeds.

By a deed dated April 25, 1894, made between the same parties and containing similar recitals, the remainder of the land was, in consideration of 375*l.* expressed to be paid to Winch, conveyed by Dent and Winch to Mrs. Dixon.

It appeared that on September 13, 1893, Winch had signed and given Mrs. Dixon a receipt in the following terms: "Received this 13th September, 1893, of Mrs. Dixon the sum of 1*l.* as deposit in purchase of my three cottages in Bury Road, Harlow, for the sum of six hundred and eighty five pounds. She to have a free conveyance prepared by Mr. Dent and to accept my title from him. The purchase to be completed on September 16, 1893."

No abstract of title was furnished to Mrs. Dixon, and no investigation of any sort was made on her behalf. The first purchase by her was completed at her house, Winch and Dent being present. Mrs. Dixon gave to Dent a bearer cheque from her brokers for 685*l.* 1*s.* 6*d.*, and received back 1*l.* 1*s.* 6*d.* from Winch. After Dent and Winch had left Mrs. Dixon's house they went to Dent's house, and Dent then handed to Winch an account as follows:—

	£	*s.*	*d.*
Principal	425	0	0
Interest from 11 January, 1893, to 15 September, 1893	12	10	0
Costs	14	0	0
	451	10	0
Cheque of Mrs. Dixon	685	1	6
	451	10	0
	£233	11	6

Dent retained 451*l.* 10*s.* out of the 685*l.* 1*s.* 6*d.*, and paid the balance, 233*l.* 11*s.* 6*d.*, to Winch by his own cheque.

No further account of the pecuniary dealings between himself and Winch was furnished by Dent to Winch, and there was nothing to shew how the 425*l.*, or the interest, was made up. The circumstances attending the second sale to Mrs. Dixon were substantially the same.

Down to the time when Dent absconded, Mrs. Dixon was in receipt of the rents and profits of the property which she had purchased. On the real facts becoming known, Miss Ellman gave notice to Mrs. Dixon of the transfer to her of the mortgage. Mrs. Dixon then brought this action against Winch and Miss Ellman, alleging that she was a purchaser for value without notice, and claiming a conveyance from Miss Ellman of the legal estate in the property free from incumbrances, and, alternatively, she claimed to redeem the mortgage and to be indemnified by Winch against all moneys and costs which she might have to pay.

It was not alleged that the plaintiff when she purchased the property had in fact any notice of Miss Ellman's security. The defendant Winch in giving evidence swore that he did not know of the transfer to Miss Ellman; that he trusted Dent, and left everything to him, and signed whatever documents Dent put before him for his signature.

The action was heard before Cozens-Hardy J. on June 6, 1899.

Eve, Q.C., and *Christopher James*, for the plaintiff. When the plaintiff bought the property she had no notice of the mortgage. She thought she was buying it free from incumbrances. The mortgage was suppressed by the fraud of Dent. She was to have a free conveyance from Winch. Dent was not her solicitor in the matter; she paid him nothing. She was, therefore, in the position of a purchaser for value without notice; and, as the mortgage was paid off by Winch out of the purchase-money without notice of the transfer to the defendant Ellman, she is entitled to the benefit of that payment and to have a conveyance from Miss Ellman of the legal estate free

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from incumbrances: *In re Lord Southampton's Estate* (1); *Withington* v. *Tate* (2); *Jones* v. *Gibbons*. (3) But, if necessary, the plaintiff claims the right to redeem the mortgage and to be indemnified by Winch.

Hughes, *Q.C.*, and *Hayter*, for the defendant Winch. As between Winch and Miss Ellman, the mortgage has been paid off. Payment to the original mortgagee without notice of a transfer is good as against the transferee: *Matthews* v. *Wallwyn* (4); *Williams* v. *Sorrell*. (5) It is a question of account, and in taking the account credit must be given, as against Miss Ellman, for the moneys paid by Winch before he received notice of the transfer: *In re Lord Southampton's Estate* (1); *Bickerton* v. *Walker* (6); Fisher on Mortgages, 5th ed. p. 825.

[COZENS-HARDY J. The plaintiff took her conveyance from Winch and Dent with false recitals. It was this false statement which has caused the trouble.]

The plaintiff may have a right to complain of that, as against Winch, but Miss Ellman has no such right. She has been paid off and has only the legal estate. It was her negligent act in omitting to give Winch notice of the transfer which enabled Dent to commit the fraud. Winch trusted his solicitor Dent, who has deceived him.

Micklem and *Harman*, for Miss Ellman. The plaintiff has no title against Miss Ellman unless she can shew that the mortgage has been paid off. If Dent was not her solicitor, then she was negligent in accepting the title without any inquiry: Dart's Vendors and Purchasers, 6th ed. p. 990. But the evidence shews that Dent acted as her solicitor in the matter, although Winch paid him. Through Dent, therefore, she had constructive notice of the mortgage: *Boursot* v. *Savage* (7); *Kettlewell* v. *Watson* (8); *Bradley* v. *Riches* (9); *Rolland* v. *Hart*. (10)

(1) (1880) 16 Ch. D. 178.
(2) (1869) L. R. 4 Ch. 288.
(3) (1804) 9 Ves. 407, 410; 7 R. R. 247.
(4) (1798) 4 Ves. 118.
(5) (1799) 4 Ves. 389.
(6) (1885) 31 Ch. D. 151, 158.
(7) (1866) L. R. 2 Eq. 134.
(8) (1882) 21 Ch. D. 685.
(9) (1878) 9 Ch. D. 189.
(10) (1871) L. R. 6 Ch. 678.

[COZENS-HARDY J. Can she not say, even then, that the mortgage has been paid off by Winch?]

No; because, if she took with notice of the mortgage, payment was made to the wrong person. Dent was also solicitor for Winch, who must be taken to have constructive notice of the transfer. There was no fraud in transferring the mortgage, but in concealing the transfer.

[*Eve, Q.C.*, referred to *Kennedy* v. *Green*. (1)]

Kennedy v. *Green* (1) does not apply. There, there had been a prior fraud. Here, the fraud is committed at the time of the sale to the plaintiff. The case of *Atterbury* v. *Wallis* (2) is very like the present. Further, Winch was guilty of negligence in paying off the mortgage without requiring the mortgage deed to be handed over. If he had done so, the existence of the transfer must have been disclosed. Under the circumstances he had notice of the transfer, and was also an active party to the false recitals in the plaintiff's conveyance.

Eve, Q.C., in reply, cited *Kennedy* v. *Green* (1) and *Cave* v. *Cave*. (3)

Cur. adv. vult.

1899. June 19. COZENS-HARDY J., after stating the facts, continued:—Under these circumstances it is necessary to consider upon whom the loss due to the fraud of Dent ought to fall. Now, as to Winch, it is clear that Dent was his solicitor throughout. It is also clear that by executing the two conveyances to the plaintiff containing recitals which were false to his knowledge—for he cannot be heard to say that he was not aware of the conveyance by Dent to himself and the subsequent mortgage by him to Dent—he has been the real occasion of the fraud. With reference to Miss Ellman, Dent was undoubtedly her solicitor in the matter of the transfer. She however got from Dent all that she was entitled to have; and the only negligence that can be attributed to her is the omission to give Winch notice of her transfer. With respect to the plaintiff, Mrs. Dixon, there is more difficulty. I think, however, that I

(1) (1834) 3 My. & K. 699; 41 R. R. 176.

(2) (1856) 8 D. M. & G. 454.

(3) (1880) 15 Ch. D. 639.

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must hold that Dent was her solicitor in the matter of the two conveyances, although by the terms of her contracts he was to be paid by Winch. The reasoning of Turner V.-C. in *Hewitt* v. *Loosemore* (1) seems to me to apply to the present case. Now, at the moment when the plaintiff's purchase was completed, in September, 1893, the position of the parties was as follows: Miss Ellman was legal mortgagee of the entire property for 350*l.* and interest. Mrs. Dixon acquired by her conveyance only the equity of redemption in part of the property subject to this mortgage, whether she had or had not notice of the legal mortgage. Winch remained owner of the equity of redemption of the remaining part of the property comprised in Miss Ellman's mortgage. Miss Ellman contends that nothing has happened to deprive her of the position which she admittedly held at the moment when Mrs. Dixon paid her purchase-money to Winch. On the other hand, Mrs. Dixon contends, and in this contention she is supported by the defendant Winch, that nothing is due to Miss Ellman on her mortgage, because Winch, in September, 1893, paid off Dent, the mortgagee, without having notice or knowledge of Dent's transfer to Miss Ellman. It is well settled that where a mortgage is transferred without the privity of the mortgagor the transferee takes subject to the state of account between the mortgagor and mortgagee at the date of the transfer: *Matthews* v. *Wallwyn*. (2) And it is also well settled that payments of interest or payments on account of principal made by the mortgagor to the mortgagee after, but without notice of, a transfer must, in the absence of collusion, be allowed to the mortgagor as against the transferee: *Williams* v. *Sorrell*. (3) This doctrine has been extended to the case where the whole mortgage debt is, under similar circumstances, paid off: see *Norrish* v. *Marshall* (4) and *In re Lord Southampton's Estate*. (5) Apart from these authorities, I should have thought it reasonable to hold that where the mortgagor, being entitled on payment off of the mortgage to the actual custody of the mortgage

(1) (1851) 9 Hare, 449.
(2) 4 Ves. 118.
(3) 4 Ves. 389.
(4) (1821) 5 Madd. 475.
(5) 16 Ch. D. 178.

deed and other documents of title, which in fact are in the possession of the transferee, chooses to pay the mortgagee without asking for the deeds, he ought not to be allowed, as against the transferee, to justify such payment. I should have thought that this negligence on the part of the mortgagor was far greater than the negligence of the transferee in omitting to give notice of the transfer. But I am asked to apply this principle to a case where the money which is said to have been paid by Winch to Dent in satisfaction of the mortgage was part of the purchase-money procured by the solemn statement in the conveyance by Winch and by Dent that there was not any mortgage, and that there never had been any mortgage. I decline thus to extend the doctrine. I am not satisfied how the 425*l.* mentioned in the document above referred to was arrived at. I cannot treat Winch as an innocent and perfectly honest mortgagor making a payment to the mortgagee in good faith for the purpose of redeeming his mortgage. I must treat him as colluding with Dent to obtain Mrs. Dixon's purchase-money by means of false recitals; and I cannot recognise the retention by Dent of 451*l.* 10*s.* as equivalent to a payment off of the mortgage for 350*l.* without notice of the transfer. Moreover, the question is not now between Miss Ellman and Winch, but between Miss Ellman and Mrs. Dixon. It would be a lucky accident for Mrs. Dixon if I should be driven to hold that the legal mortgage, subject to which she bought, has been since discharged without either party being aware of the fact by reason of a transaction between Winch and Dent. There is no equity in favour of Mrs. Dixon; and, under the circumstances, I am not prepared to destroy Miss Ellman's security for her benefit. In the view which I take, it is not necessary for me to express any opinion upon the difficult question whether Mrs. Dixon is to be affected with the knowledge which her solicitor, Dent, had of Miss Ellman's security. The result is that I must declare that Miss Ellman's mortgage is a valid subsisting charge for 350*l.*, with interest and the costs of the action and counter-claim. I understand that Mrs. Dixon will redeem. If the figures are not agreed, there must be the usual foreclosure decree in favour of Miss Ellman. As between

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Mrs. Dixon and the defendant Winch, he must indemnify her against all payments she has to make to Miss Ellman, and must pay her costs of the action.

H. L. F.

C. A.

From this appeal both the plaintiff and the defendant Winch appealed. The appeal came on for hearing on March 13, 1900.

Eve, Q.C., and *Christopher James*, for the plaintiff.
Hayter, for the defendant Winch.
Micklem, Q.C., and *Harman*, for the defendant Miss Ellman.

The arguments were in substance the same as those in the Court below. It is considered unnecessary to report them at length, having regard to the ground on which the decision of the Court ultimately rested.

[The following authorities were referred to: *Norrish* v. *Marshall* (1); *In re Lord Southampton's Estate* (2); *Matthews* v. *Wallwyn* (3); *Williams* v. *Sorrell* (4); *Le Neve* v. *Le Neve* (5); *Marjoribanks* v. *Hovenden* (6); *Bradley* v. *Riches* (7); *In re Cox and Neve's Contract* (8); *Oliver* v. *Hinton* (9); *Bickerton* v. *Walker* (10); *Atterbury* v. *Wallis* (11); *Hewitt* v. *Loosemore* (12); *Kettlewell* v. *Watson* (13); *Espin* v. *Pemberton* (14); *In re Cousins* (15); *Kennedy* v. *Green* (16); *Rolland* v. *Hart* (17); Dart's Vendors and Purchasers, 6th ed. p. 992.]

LINDLEY M.R. I think it is unnecessary to consider the authorities which have been cited, for there is one view of the case which, as it seems to me, is quite sufficient to enable us to dispose of it. The question is whether the plaintiff, who has bought this property (previously mortgaged by the defendant

(1) 5 Madd. 475.
(2) 16 Ch. D. 178.
(3) 4 Ves. 118.
(4) 4 Ves. 389.
(5) (1748) 3 Atk. 646.
(6) (1843) 6 Ir. Eq. Rep. 238.
(7) 9 Ch. D. 189.
(8) [1891] 2 Ch. 109.
(9) [1899] 2 Ch. 264, 267.
(10) 31 Ch. D. 151.
(11) 8 D. M. & G. 454.
(12) 9 Hare, 449.
(13) 21 Ch. D. 685, 705.
(14) (1859) 3 De G. & J. 547, 554.
(15) (1886) 31 Ch. D. 671, 676.
(16) 3 My. & K. 699; 41 R. R. 176.
(17) L. R. 6 Ch. 678, 682.

Winch) is entitled to compel Miss Ellman, to whom the mortgage has been transferred, to give up her security. One thing is clear—namely, that Dent, the solicitor who acted in the matter, and the original mortgagee, cheated both Winch and Mrs. Dixon. [His Lordship stated some of the facts above mentioned, and continued:—]

It did not occur to Miss Ellman to give notice to Winch of the transfer of the mortgage to her. Dent ought to have done this: it was his duty both to her and to Winch to do so, and not to allow Winch to pay the mortgage money to the wrong person. Dent continued after the transfer to pay the interest to Miss Ellman. Then Dent and Winch together sold and conveyed the property to Mrs. Dixon. Winch left everything connected with the sale to Dent. Dent inserted in the conveyance to Mrs. Dixon a deliberately false recital, suppressing altogether the mortgage and the transfer of it, and stating that the property was unincumbered. The result is that a gross fraud has been perpetrated upon Mrs. Dixon, but Winch was a mere tool of Dent in the transaction. The property was sold as free from incumbrances when it was really subject to the mortgage to Miss Ellman. Winch cannot derive any benefit from that. Then Dent having thus cheated Mrs. Dixon proceeded next to cheat Winch. An account was settled between them, Dent retaining the mortgage debt out of Mrs. Dixon's purchase-money, which she had paid to him. And now she says that this transaction enables her, though she had in fact bought the property subject to the mortgage, to throw the loss upon Miss Ellman. She says that though she bought only the equity of redemption, yet luckily for her Miss Ellman has been paid off by means of the payment to Dent, because Winch had no notice of the transfer. This seems to me to be a subtle refinement based upon the equitable doctrine that, when a mortgage has been transferred, the mortgagor is still entitled to go on paying the original mortgagee if he has had no notice of the transfer. But was the payment to Dent such a payment of the mortgage debt as would have entitled Winch to have demanded a reconveyance of the property from Miss Ellman? Considering the manner in which Winch had placed himself

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entirely in the hands of Dent, I think the knowledge which Dent had must be imputed to him. He is, in my opinion, affected by the knowledge of that which Dent knew, and cannot therefore avail himself of his actual ignorance of the transfer of the mortgage. He must be treated as having known that it had been transferred to Miss Ellman, and that he was paying the mortgage money to the wrong person, and the plaintiff stands in no better position than Winch. The mortgage must be treated as still subsisting, and as a security to Miss Ellman for 350*l.* and interest, and the plaintiff must take the property subject to it. Both the appeals must be dismissed.

RIGBY L.J. I agree. I sympathise equally with Mrs. Dixon and with Miss Ellman, who were both ignorant of legal matters, and are both free from blame. Nor can I withhold my sympathy from Winch. There is no ground for attributing to him any fraudulent intention, though every act of Dent in the matter was tainted with fraud. I have not looked carefully at the cases which have been cited to us, because, in my opinion, we can set them aside for the purpose of deciding the present case. Under the circumstances, I think Winch is not entitled to say that he was ignorant of any material fact which was known to Dent. He must be taken to have known that the mortgage had been transferred to Miss Ellman, and that in paying Dent he did not discharge the mortgage in her hands.

VAUGHAN WILLIAMS L.J. I am much troubled about this case, because it deals with matters my familiarity with which is of but recent acquisition. But under these circumstances I do not think I should be discharging my judicial duty in differing from my brethren, unless I were perfectly certain that I was right, nor merely because, but for their opinion, I might myself have arrived at a different conclusion. Still, I think it is my duty to express the doubts and difficulties which I feel in arriving at the same conclusion as they do. Cozens-Hardy J. based his decision upon the ground that, although it is a recognised rule in equity that, when a mortgage has been transferred, a payment made by the mortgagor to the original

mortgagee is good as against the transferee, provided that the mortgagor has received no notice of the transfer, yet that rule ought not to be extended to a case like the present, in which the money paid by the mortgagor to the original mortgagee was part of the purchase-money fraudulently obtained by means of a false recital in the conveyance to the purchaser to the effect that there was no mortgage. I do not understand that either of my learned brethren has based his affirmance of the decision on that ground. I understand the ground of their decision to be this—that in these transactions as a whole there was such a general agency of Dent for Winch that the knowledge of Dent must be imputed to Winch, and that Winch cannot be allowed to set up his actual ignorance of matters which were within the knowledge of Dent. My difficulty in accepting this view of the case is that there were, as it seems to me, two distinct transactions in which different persons were engaged. The first transaction was the conveyance of the property by Dent and Winch to Mrs. Dixon. I agree that in that transaction you must impute to Winch the knowledge of all that Dent knew, and that as between Winch and Mrs. Dixon he cannot be heard to say that he did not know of the transfer of the mortgage to Miss Ellman. This is something very like an estoppel against Winch setting up his actual ignorance of the transfer. But in my view this estoppel does not extend to anything outside that particular transaction. The result of the first transaction was that Mrs. Dixon took the property subject to the mortgage to Miss Ellman, and I do not understand her to deny this. Of course Winch is bound to indemnify her against that mortgage. That was the state of things when the conveyance was completed, and Mrs. Dixon had paid the purchase-money to Dent as agent for Winch. Shortly afterwards a settlement of accounts took place between Dent and Winch, and Winch allowed Dent to retain the mortgage debt out of the purchase-money. Then the question is, ought we to impute to Winch at that moment the knowledge of the fact that Dent had transferred the mortgage to Miss Ellman? In truth and in fact Winch knew nothing about it, and his allowing Dent to retain the money is the

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strongest possible evidence that he believed Dent to be still the mortgagee, and as such entitled to receive the mortgage-money. It may very well be that the knowledge of Dent must be imputed to Winch on the ground that he had placed himself in such a general relationship to Dent that he must be treated in all matters as having the knowledge which Dent had. I agree that the two transactions were immediately consequent on one another, and were very closely connected, though I have felt a difficulty in treating them as one. Under the circumstances, it might be right to draw the inference of fact that there was such a general agency of Dent for Winch that we ought to impute to Winch the knowledge of all which Dent knew, and that he must be taken to have known that he was paying the money wrongfully. On this question of imputed knowledge, I prefer to adopt the judgment of my learned brethren. I have only intended in what I have said to point out the difficulties which I have felt in treating both the transactions as one, and then imputing Dent's knowledge to Winch.

Solicitors: *Druces & Attlee; West, King, Adams & Co.; C. F. Ingram.*

W. L. C.

ATTORNEY-GENERAL *v.* COMPANY OF PROPRIETORS OF MARGATE PIER AND HARBOUR.

KEKEWICH J.

1900

March 8.

[1899 A. 707.]

Action—Limitation—Public Authorities Protection Act, 1893 (56 & 57 *Vict.* c. 61), *s.* 1 (*a*)—*Persons acting in the Execution of any Public Duty or Authority—Company incorporated by Act of Parliament with Statutory Duties—Company dividing Profits.*

A company incorporated by Act of Parliament, not only for the performance of duties of public utility, but also for the purpose of earning profits, is not entitled to the benefit of the Public Authorities Protection Act, 1893.

Dictum of Jeune P. in *The Ydun*, [1899] P. 236, 239, followed.

THIS was an action by the Attorney-General, at the relation of the mayor, aldermen, and burgesses of Margate, and by the said mayor, aldermen, and burgesses as plaintiffs, to determine, in substance, whether the defendant company had been applying the income of a certain part of its funds in the manner prescribed by the Acts of Parliament by which it was incorporated and regulated. The plaintiffs claimed (in effect) declarations as to the manner in which the accounts of the company ought to be kept, and the income in question applied; an injunction to restrain the company from applying the income otherwise than according to its Acts; and an order that the company might be directed to make good to the fund in question all moneys which had been improperly diverted therefrom.

The defendant company, amongst other defences, claimed the benefit of the provisions as to the limitation of actions contained in the Public Authorities Protection Act, 1893; and the only point upon which the case calls for a report was whether a company constituted as was the defendant company could claim the benefit of that Act. (1)

(1) 56 & 57 Vict. c. 61, s. 1: "Where after the commencement of this Act any action, prosecution, or other proceeding is commenced in the United Kingdom against any person for any act done in pursuance, or execution, or intended execution of any Act of Parliament, or of any public

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It appeared that under certain statutes of 1787, 1799, and 1809, the pier and harbour of Margate were vested in commissioners known as Commissioners of the Pier and Pavement, to whom were entrusted the duties of rebuilding, improving, and preserving the pier and harbour, and of widening, paving, repairing, cleansing, lighting, and watching the streets in the town of Margate. By an Act passed in 1812 (52 Geo. 3, c. clxxxvi.) the management of the pier and harbour was separated from the paving and lighting of the town. These latter duties were left in the hands of the commissioners (who were now represented by the plaintiff corporation), but the pier, harbour, and works were vested in the defendant company, which was incorporated by the Act, and was authorized to complete and maintain the harbour, pier, and works then unfinished, and to raise moneys for that purpose by the issue of shares, and was empowered to levy and take certain rates and duties, and also to borrow money on the security of the rates. It was further provided by the Act that all moneys received for rates and duties payable to the defendant company should be applied in paying the interest on moneys borrowed under the old Acts, or under their Act, and afterwards in the payment of the charges and expenses of carrying out, completing and finishing, maintaining, regulating, repairing, and preserving the pier and harbour; and, when all such payments should have been made and satisfied, then the residue of the said rates and duties was to be applied in paying a dividend to the shareholders, but at a rate not exceeding 10 per cent. in any one year. The surplus income of the company beyond the dividend was to be annually set apart as a sinking fund to meet the expenses of future repairs or improvements in the pier and harbour; and in the meantime such surplus was to be invested, and the income arising therefrom

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duty or authority, or in respect of any alleged neglect or default in the execution of any such act, duty, or authority, the following provisions shall have effect:—

"(*a*) The action, prosecution, or proceeding shall not lie or be instituted unless it is commenced within six months next after the act, neglect, or default complained of, or, in case of a continuance of injury or damage, within six months next after the ceasing thereof. . . . ."

added thereto and accumulated. When and so often as the sinking fund amounted to 20,000*l.*, no further surplus revenue was to be added to it, and in that case the surplus revenue was to be applied in paying off any principal moneys owing on the rates, and then in paying off the money paid on the shares of the company until the whole of the money paid thereon should have been fully paid off; whereupon the defendant company was to be dissolved, and the pier, harbour, and works, and also the sinking fund, vested in the Commissioners of Pier and Pavement, and the management of the pier and harbour re-transferred to them.

For the purposes of the argument it was assumed that the action was not brought within six months after the act, neglect, or default complained of within the meaning of s. 1 (*a*) of the Act of 1893.

Macmorran, Q.C., *Younger, Q.C.*, and *Christopher James*, for the plaintiffs. The defendant company is not a public authority within the meaning of the Public Authorities Protection Act, 1893. In *The Ydun* (1) Jeune P. expressed an opinion that a railway company, a company which acts under statutory powers, was not within the meaning of the Act. The defendant company is in much the same position as a railway company. It was constituted for purposes of gain, and it makes a return to its shareholders.

In *Fielding* v. *Morley Corporation* (2) Lindley M.R. referred to the title of this Act as material for the purpose of considering the scope of the Act. It is "to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties"; and he short title refers to "Public Authorities." The whole scope of the Act shews that it was intended to apply to public authorities properly so called, such as municipal bodies, and not to companies formed for commercial profit.

Swinfen Eady, Q.C., and *Vaughan Hawkins*, for the defendant company. The company is acting in the execution of statutory duties, and is a "public authority" within the Act.

(1) [1899] P. 236, 239. (2) [1899] 1 Ch. 1, 3.

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There are no words in the Act which exclude a corporation which may be earning and distributing profits. The opinion of Jeune P. in *The Ydun* (1) was a mere dictum; and though his decision in the case was affirmed by the Court of Appeal, that question was not dealt with there.

KEKEWICH J. intimated that he should not grant an injunction, or make an order directing repayment, and, after dealing with other parts of the case, he continued:—There is a question of far greater importance. I have thus far only dealt with an action brought against this particular pier company, and have considered the Act of 1812; but I now come to an Act of a general nature, and, although the point arises with reference to this particular pier and harbour company, it really is a matter of great importance on which there is at present a dearth of authority. The short title of the Act to which I am referring is "The Public Authorities Protection Act, 1893," but the full title is "An Act to generalise and amend certain statutory provisions for the protection of persons acting in the execution of statutory and other public duties." It enacts among other things that an action, prosecution, or proceeding shall not lie or be instituted against a body which is within the meaning of the Act, unless it is commenced within six months next after the act, neglect, or default complained of. I will not pause to consider whether this action in its main purport could be brought within this Act at all, seeking, as it does, declarations mainly how the accounts of the company ought to be kept and how the moneys ought to be applied, and I might dispose of the case on that ground only; but, in view of the very great importance of the point raised, whether the defendants are entitled to the benefit of the Act or not, I think it is right that I should express my opinion upon it.

The 1st section of the Act defines the parties in this way: [His Lordship read the first part of the section, and continued:—]

Now, craving in aid what I may call the long title, and also the short title, ought I to hold that the defendant company is

(1) [1899] P. 236, 239.

within the meaning of that section? Let us remember what it is. The company was in existence in a different form long before the year 1812. In the last century the pier and harbour were vested in commissioners, who not only looked after the pier and harbour, but also after the widening, paving, repairing, cleansing, lighting, and watering the streets in the town of Margate. Those are no doubt public duties, and have always been recognised as such. If those commissioners had continued to exist, they could not have been regarded otherwise than as public persons—persons, within the meaning of the Act, discharging public duties. But in 1812 there was a severance, and those municipal duties were left in the commissioners, now represented by the corporation, and the pier and harbour became vested in the company, then called the Company of Proprietors of Margate Pier and Harbour, and they to-day hold the pier and harbour in the way I have mentioned. They have parted from the commissioners—they are a separate entity created by the Act of 1812, and not only their existence, but their duties and liabilities, are defined by that Act. They are a company for maintaining the pier and the harbour. Piers and harbours are, no doubt, works of great importance to the public, and the maintenance of them is for the public utility. So is a railway, so is a tramway, so is a canal, and one might mention other things in the same category. The company are to spend their money in paying interest on charges, they are to keep up their pier and harbour, and, beyond that, except that they are limited to 10 per cent. dividend, and there is to be a sinking fund provided they are a commercial company, intended to earn, and in fact earning dividends year by year for the benefit of the shareholders. I do not see myself the distinction between that and a railway company incorporated by special Act, with reference to the Lands Clauses Act, and the Railway Clauses Consolidation Act, 1845, and subsequent Acts. They are companies intended to benefit the public. No special Act of Parliament of that kind is ever passed without a recital that the construction and maintenance of the line, or the tramway, or the canal, as the case may be, is for the public benefit; and the powers which are

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given to companies of that kind, such as the power of compulsory purchase of land, are all given on the footing that the companies are doing a public benefit, and yet they are commercial companies.

It would be difficult to say that these companies are not, except in the one sense which I am now considering, public companies doing public duty; and if I were left entirely alone, I should be very much puzzled to know whether a railway company came within this Act of Parliament. In the long title the words are, "acting in the execution of statutory and other public duties." If that were to be taken in its most literal construction, any company exercising any power by virtue of an Act of Parliament would come within that meaning. I cannot think that was intended. It is right and necessary to construe the title reasonably, and I read these words as meaning "public duties whether statutory or otherwise." The Master of the Rolls referred to that part of the Act in *Fielding* v. *Morley Corporation* (1), and though he had the Act before him on a different point—on the question of the costs being between solicitor and client—still he did state that the title ought to be read. He says: "I read the title advisedly, because now, and for some years past, the title of an Act of Parliament has been part of the Act. In old days it used not to be so, and in the old law books we were told not so to regard it; but now the title is an important part of the Act, and is so treated in both Houses of Parliament."

The exact point which arises here was considered by the President of the Probate Division in *The Ydun*. (2) That was an Admiralty case, and the President had to consider whether a municipal authority, which was also discharging certain navigation and dock duties, was, for that purpose, a public body entitled to the protection of the Act. Of course it was as a municipal authority; but the question was whether it was to be treated as a public body when it was discharging duties such as those then in question, as, for instance, the duties of a water or a gas company. He expressed the opinion that it undoubtedly would be, and that is what he gave his judgment upon—that in

(1) [1899] 1 Ch. 1, 3. (2) [1899] P. 236, 239.

that connection it was undoubtedly a public body; but in some introductory remarks he said: "It is not easy to see why a railway company, for example, a corporation which certainly does acts in pursuance or execution of an Act of Parliament, is not included. This clearly, however, is not what the Act means." His decision was affirmed by the Court of Appeal; but the Court of Appeal took it for granted, I think, that the corporation there was a public body, and, as far as I can see, there was no criticism of what was said by the President in the Court below. But I have that distinct authority, although it was not necessary for the purpose of his decision for the President to give that expression of his opinion; and I gladly accept his interpretation. On that, therefore, I hold that this action will lie.

[His Lordship then dealt with the rest of the case, coming to the conclusion that the defendants had not followed the Act in their mode of keeping their accounts, though no moral blame attached to them; and he made a declaration to the effect asked for by the plaintiffs.]

Solicitors: *Warren, Murton & Miller, for Edward Brooke, Margate; Kingsford, Dorman & Co., for Toke Harvey Boys, Margate.*

C. C. M. D.

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1900
Feb. 7, 8; *March* 9.

COSTA RICA RAILWAY COMPANY, LIMITED *v.* FORWOOD.

[1897 C. 357.]

Company—Director—Fiduciary Character—Contracts with Company—Declaration of Interest—Collateral Profits.

By the articles of association of a railway company, it was provided that a director should vacate his office if he was concerned in, or participated in the profits of, any contract with the company without declaring the nature of his interest; but "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with or done any work for, the company; or by reason of his being interested, either in his individual capacity, or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest"; but the director was not to vote on contracts of this kind, and if he did, his vote was not to be counted. The railway company, of which F. was a director, shortly after its formation entered into contracts with a steamship company for the carriage and shipment of bananas. F. was the largest shareholder in the steamship company, and was also a partner in the firm that managed it: no disclosure of F.'s interest was made either in the prospectus of the railway company, or when the contracts were entered into. The railway company brought an action against F. to make him liable for all profits received by him, as a shareholder in the steamship company, and as partner in the firm that managed it, under the contracts with the plaintiff company. F. having died before the trial, the action was revived against his executors:—

Held, on the authority of *Imperial Mercantile Credit Association* v. *Coleman*, (1871) L. R. 6 Ch. 558 (which has not been overruled on this point by S. C. (1873) L. R. 6 H. L. 189), and on the articles of association, that F.'s estate was not liable to account for any collateral profits made out of the contracts entered into with the plaintiff company, and that the action must be dismissed.

ACTION.

The question for decision in this action was the liability of the executors of the late Sir Arthur Forwood to account for profits alleged to have been made by him, while a director of the plaintiff company, out of certain contracts entered into by the plaintiff company with another company, and with firms in which Sir Arthur Forwood was also a shareholder and

partner. The facts, so far as material, and as found by the Court, were as follows:—

For several years prior to 1884, one Minor Cooper Keith worked, under lease from the Government of Costa Rica, a railway of about seventy-one miles in length from the port of Limon, on the Atlantic seaboard of the said Republic, to Carillo, in the interior of the country, and by a contract or concession made in April, 1884, between the said Republic of the one part, and Keith of the other part, Keith amongst other things undertook to construct and equip certain new railways, and to equip, repair, and alter the then existing railways of the Republic; and, in consideration of this, the Republic conveyed the existing lines and the new lines when constructed with their equipment to Keith for a period of ninety-nine years, together with a grant of 800,000 acres of Government land on certain conditions, including a provision for the formation of a company to take over the concession when the railways had been constructed.

Keith, in addition to being interested in the railways, was also the owner of banana plantations, and the largest grower of bananas in Costa Rica, and was engaged on an extensive scale in the business of exporting that fruit to the United States of America. The railway from Carillo to Port Limon connected the banana-growing districts with the harbour at Limon, whence the bananas were shipped to New York and New Orleans.

Sir Arthur Forwood was the principal shareholder in the Atlas Steamship Company, Limited, which had steamers running from Port Limon to New York; he was also the senior partner in the firm of Leech, Harrison & Forwood, who were the managers of the Atlas Company (there being no directors or other governing body of that company), and as such entitled to 5 per cent. of the gross earnings thereof; he was also a member of the firm of Pim, Forwood & Kellock of New York, who acted as the agents in America of the Atlas Company, and participated in the profits of the banana business.

Messrs. J. L. Phipps & Co. were owners of a line of steamers running from Port Limon to New Orleans.

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In April, 1886, terms were arranged between Keith, the Atlas Company, and Phipps & Co. with regard to the construction of the railways and the carrying on of the banana trade, which were embodied and carried out by means of three agreements, which were executed, two of them on May 19, 1886, and the third on June 21, 1886.

On April 26, 1886, the plaintiff company was incorporated with a nominal capital of 1,800,000*l.* divided into 180,000 shares of 10*l.* each, and with a memorandum and articles of association which did not in terms refer to any of the said three agreements. By art. 81, the office of a director was to be vacated (inter alia), "If he is concerned in or participates in the profits of any contract with the company, or of any work done for the company, without declaring and setting forth in writing the nature of his interest, such declaration, if his interest then exists, to be made at the meeting of the board at which such contract is determined on or work ordered, and in any other case at the first meeting of the board held after the acquisition of his interest."

"But the above rules shall be subject to the following exceptions:—

"That no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with, or done any work for, the company: or by reason of his being interested either in his individual capacity or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest. Provided nevertheless that in no case shall any director having such interest as aforesaid vote in respect of such agreement, contract, work, adventure, or undertaking, and if he or they so vote, such vote shall not be counted."

By the first of the agreements of May 19, 1886, called the Construction Agreement, and which was made between the plaintiff company of the one part and Keith of the other part, Keith (amongst other things) agreed to transfer to the company the said concession and premises, to construct, complete, and equip the railways and works therein comprised, within

maximum period of three years and nine months from the date of the said contract, and to pay interest upon the first mortgage debentures of the company therein mentioned until the said railways should have been completed and taken over by the company, and in consideration of the premises, Keith was to be entitled to the whole of an intended issue of first mortgage debentures and second debentures of the company securing principal sums of 655,000*l.* and 600,000*l.* respectively, and so much of the share capital of the company (1,800,000*l.* in amount) credited as fully paid as was not taken by the subscribers of the memorandum of association of the said company, or appointed to the Government of Costa Rica, or the holders of the bonds constituting the existing debt thereof, under the terms of the said concession, and with the view of raising the necessary cash capital for the execution of the works, provision was made for the company offering from time to time for public subscription, as and when required by Keith, the whole or any part of the said first mortgage debentures and second debentures and share capital of the company, constituting the aforesaid consideration payable to Keith.

By the second agreement, called the Banana Contract, and which was made between the company of the first part, Keith of the second part, the Atlas Company of the third part, and Phipps & Co. of the fourth part, after reciting the construction agreement, and that Keith was then working for his own benefit the said railway from Limon to Carillo, and by means thereof was enabled readily to carry to the port of Limon large quantities of bananas, in the cultivation of which he was interested; that the steamers of the Atlas Company and Messrs. Phipps were engaged in the said banana traffic, and that both lines were, by arrangement with Keith, being worked in concert with the said railway; and after a further recital to the effect that the parties thereto of the second, third, and fourth parts had requested the railway company, in anticipation of the delivery to the railway company of the said railways, to enter into an arrangement respecting the continuance of the said banana traffic, and to allow them special facilities with reference thereto, which the railway company had consented to

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do, upon the terms and conditions thereinafter appearing, it was agreed that the railway company should from and after obtaining possession of the railways and thenceforth during the continuance of the agreement, from time to time, as required by Keith or his agents, take up and convey to their pier at Limon and stow on board the vessels, to be provided by the Atlas Company and Messrs. Phipps, all bananas tendered by Keith; the said agreement contained elaborate provisions for the supply by the railway company of special trains for the traffic with precedence over all other trains on the said system, except passenger and Government trains, together with provisions as to the delivery and stowage of the fruit, the supply by the railway company of berths at Limon for the vessels of the Atlas Company and Messrs. Phipps (these latter being bound in turn to supply a sufficient number of vessels for the traffic), and as to the rates and dues to be charged by the railway company, which the railway company were guaranteed should always reach a minimum of $125,000 a year. And it was further provided that, during the continuance of the said agreement, none of the special facilities thereby provided should be afforded by the railway company to any other person, firm, or corporation, nor should they allow to any such person, firm, or corporation any rebates or discounts such as were thereby allowed, or give any of the advantages or privileges which were thereby granted to the parties thereto of the second, third, and fourth parts.

By the agreement of June 21, 1886, called the Syndicate Agreement, and which was made between Keith of the first part, the Atlas Company of the second part, and Phipps & Co. of the third part (which was to be read as an annex to the banana contract, and was to take effect when that contract came into operation and was to determine when it determined), Keith agreed to select and purchase and ship, at the said port of Limon, all bananas the subject of the traffic to be established under the provisions of the banana contract, and to sell to the Atlas Company and Phipps & Co. in manner therein mentioned, at the prices thereby prescribed, all bananas grown upon any plantation then or thereafter to be in his possession,

or under his control or management, or purchased by him, as therein mentioned, it being provided that while the maximum quantity of bananas to be shipped was not to exceed 650,000 bunches of "firsts" per annum, Keith was not to be at liberty to enter into any arrangement for the shipment of any available bananas in excess of the said maximum with any person, firm, or corporation other than the Atlas Company and Phipps & Co.; and the said agreement provided that the bananas shipped thereunder should be sold by the Atlas Company for the joint account of Keith and the Atlas Company as regarded sales in or through New York, and by Phipps & Co. for the joint account of Keith and Phipps & Co. as regarded sales in or through New Orleans, and that after deducting from the gross proceeds of such sales the price at which the bananas were sold to the shippers by Keith, and all expenses, except the amount payable to the railway company under the banana contract, the balance should be credited, as to one half part, to the party by whose steamer the shipment was made, and as to the other half part, to a separate fund out of which the sum payable to the railway company under the banana contract was to be paid, and the balance divided, or provided, by Keith and the party by whose steamer the shipment was made in equal shares.

When these agreements were entered into, Sir Arthur Forwood and a member of the firm of Phipps & Co. were two of the directors of the plaintiff company. Sir Arthur Forwood continued a director until February, 1896, when he resigned. No disclosure was made in the prospectus of the plaintiff company that Sir Arthur Forwood or Phipps were interested in the "construction" or "banana" contracts; nor was any declaration of his interest made by Sir Arthur Forwood pursuant to art. 81. Profits were earned and divided under the "syndicate" agreement.

In February, 1897, the plaintiffs commenced the present action against Sir Arthur Forwood, claiming a declaration that the defendant, as a director of the plaintiff company from its incorporation until February, 1896, was liable to account to the plaintiff company for all profits made by the Atlas Company,

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the firm of Leech, Harrison & Forwood, the managers of the said company, and the firm of Pim, Forwood & Kellock, the agents of the said company in New York, or, alternatively, for all profits received by the defendant as shareholder in the Atlas Company, and as a member of the said partnership firms, from or in connection with or by means of (1.) the banana contract, and (2.) the syndicate agreement, with the usual consequential relief.

Sir Arthur Forwood having died before the action was ripe for trial, the action was revived against his executors.

Neville, Q.C., and *Younger, Q.C.*, for the plaintiff company. By reason of the fiduciary relation subsisting between Sir Arthur Forwood and the company during the time these profits were being earned, he is bound to account to the company for profits made by him from the banana contract and the syndicate agreement, either personally or by means of the undertakings in which he was shareholder and partner: *Imperial Mercantile Credit Association* v. *Coleman.* (1) The late defendant was bound to disclose to the company the exact nature of his interest; the fact that it was known he had some interest in, or connection with, these other undertakings is not enough: *Dunne* v. *English.* (2) It is admitted that no declaration was ever made under art. 81, and the proviso at the end will not enable him to evade the well-established rule of equity that profits made by a director out of contracts of this kind belong to the company.

Levett, Q.C., *Swinfen Eady, Q.C.*, and *Bremner*, for the defendants. The plaintiff company do not allege that these contracts were in any way unfair or unreasonable. It is advantageous to a company to have directors who can advance the interests of the company by their connection with other companies, and it is for this reason that clauses similar to art. 81 are introduced. It is competent for a company to do this: *Imperial Mercantile Credit Association* v. *Coleman* (3), which has not been overruled on this point. Before the defend-

(1) L. R. 6 H. L. 189. (2) (1874) L. R. 18 Eq. 524.
(3) L. R. 6 Ch. 558.

ants can be made liable to account, it must be shewn that their testator used the property of the company in order to make his profits, or that he made profits at the expense of the company: Lindley on Companies, 5th ed. p. 365. The plaintiff company cannot establish this; neither can it establish any principle of law which makes directors liable for collateral profits. The testator's estate is expressly relieved by art. 81 and the proviso at the end. The analogy of cases like *Dean* v. *MacDowell* (1) and *Aas* v. *Benham* (2) apply. Plaintiffs must shew misfeasance or breach of trust before an action of this kind can succeed: *Bentinck* v. *Fenn* (3); *Whitney* v. *Smith.* (4)

[*Farrar* v. *Farrars, Limited* (5), was also referred to.]

Neville, Q.C., in reply. The cases relied on by the defendants, as to the liability of a partner to account to his firm for profits made by him outside the partnership business, are not relevant. What we complain of is that Forwood, the shipper of goods, should contract with Forwood for the carriage of goods at the lowest possible price without disclosing his true position. The principle of the cases relied on by us covers this case, though none of the reported cases are quite like the present.

[*Aberdeen Railway Co.* v. *Blaikie* (6) and *White* v. *City of London Brewery Co.* (7) were referred to.]

Cur. adv. vult.

March 9. BYRNE J., after stating the facts and the agreements of May and June 1886, as set out above, continued:—

It is no part of the plaintiffs' case that the "banana contract" was improvident, or improper, or other than a beneficial one, for the railway company; but basing their claim upon the well-known principle of equity, that no trustee or person occupying a fiduciary position shall be allowed to retain a profit made by means of the use of any part of the trust estate, they claim that Sir A. Forwood's executors are bound to account for all profits made by the Atlas Company, and by

(1) (1878) 8 Ch. D. 345.
(2) [1891] 2 Ch. 244.
(3) (1887) 12 App. Cas. 652.
(4) (1869) L. R. 4 Ch. 513.
(5) (1888) 40 Ch. D. 395.
(6) (1854) 1 Macq. 461.
(7) (1889) 42 Ch. D. 237.

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the firm of Leech, Harrison & Forwood, by means of the "banana" contract and the "syndicate contract," or, alternatively, for all profits received by him as a shareholder in the Atlas Company, and as a member of the partnership by means of the same contracts.

The railway, and the undertaking of the railway company, were part of the property of the plaintiff company, towards which the late Sir A. Forwood, as director, stood in a fiduciary relationship.

The "banana" contract undoubtedly gave special advantages, enabling profits to be more easily earned by Keith and those interested in the bananas than could have been earned without this contract.

Sir A. Forwood was, as the largest shareholder in the Atlas Company, and as senior member of the firm of Leech, Harrison & Forwood, greatly interested in the sale of bananas to be carried under the "banana" contract.

Apart from the question arising upon the construction of the articles of association of the plaintiff company, to which I shall presently refer, I cannot doubt that Sir A. Forwood's estate would be liable to the plaintiff company, at least for all profits made by him personally, out of the banana contract, as shareholder and partner in the Atlas Company, and as partner in the firm of Leech, Harrison & Forwood, that can fairly be attributed to the advantages conferred by the last-mentioned contract in respect of the use of the railway.

Having regard to the view I take of the effect of the articles, it is not material for me to decide as to any possible further liability, and I will therefore only say that I am not to be understood, in passing the matter by, to sanction the view that Sir A. Forwood's estate could, in the absence of articles like the present, be made liable, except to the extent I have mentioned, for profits made by the Atlas Company, or by the firm of Leech, Harrison & Forwood, by means of the same contract. It was urged that it would be very difficult to ascertain the proportion of the ultimate profit made by Sir A. Forwood properly attributable to the beneficial nature of the "banana" contract, and no doubt this is so; but, as was pointed

out by the Lord Chancellor in *Docker* v. *Somes* (1), the fact of the existence of a difficulty in ascertaining the amount will not deter the Court from doing so as well as may be.

The articles of association of the railway company provide by art. 81 that the office of a director shall be vacated (inter alia), If he is concerned in or participates in the profits of any contract with the company, or of any work done for the company, without declaring and setting forth in writing the nature of his interest.

Sir A. Forwood's executors cannot, it is admitted, rely upon this clause, inasmuch as no declaration was ever made, but they rely upon the exception expressed in these words: "But the above rules" (that is, the rules as to the vacation of the office of a director) "shall be subject to the following exceptions: That no director shall vacate his office by reason of his being a member of any corporation, company, or partnership which has entered into contracts with or done any work for the company, or by reason of his being interested either in his individual capacity or as a member of any company, corporation, or partnership in any adventure or undertaking in which the company may also have an interest," with a provision in respect of voting which prevents his vote being counted in such a case.

I consider that the decision of the Lord Chancellor (Lord Hatherley) in the case of *Imperial Mercantile Credit Association* v. *Coleman* (2) covers the point. The article under consideration in that case, the 83rd, was as follows: "The office of a director shall be vacated if he contracts with the company, or is concerned in or participate in the profits of any contract with the company, or participate in the profits of any work done for the company, without declaring his interest at the meeting of the directors at which such contract is determined on or work ordered, if his interest then exists, or in any other case, at the first meeting of the directors after the acquisition of his interest; and no director so interested shall vote at any meeting or on any committee of the directors on any question relating to such

(1) (1834) 2 My. & K. 655–67; 39 R. R. 317.
(2) L. R. 6 Ch. 558.

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contracts or work." Lord Hatherley (1) goes on to deal with this clause thus: "The matter would be much more simple if the regulations of the association were in the ordinary form, if nothing whatever were said about directors interested or not interested, and if it were left to the ordinary operation of the rules of this Court, which lay down firmly that no director of a company can, in the absence of any stipulation to the contrary, be allowed to be a partaker in any benefit whatever from any contract which requires the sanction of a board of which he is a member. The reasons are given fully by the Vice-Chancellor Knight-Bruce in *Benson* v. *Heathorn* (2), cited by the learned Vice-Chancellor in his judgment, and amount to this—that the company have a right to the services of their directors, whom they remunerate by considerable payments; they have a right to their entire services, they have a right to the voice of every director, and to the advice of every director in giving his opinion upon matters which are brought before the board for consideration; and that the general rule that no trustee can derive any benefit from dealing with those funds of which he is a trustee applies with still greater force to the state of things in which the interest of the trustee deprives the company of the benefit of his advice and assistance. However, the question then remains, whether the company cannot stipulate that this is a benefit of which they do not desire to avail themselves, and if they are competent so to stipulate, whether they may not think that in large financial matters of this description it is better to have directors who may advance the interests of the company by their connection, and by the part which they themselves take in large money dealings, than to have persons who would have no share in such transactions as those in which the company is concerned. It is not for me to say which was the wiser or better course of the two, nor do I think that this Court professes to lay down rules for the guidance of men who are adult, and can manage and deal with their own interests. It would be a violent assumption if anything of that kind were attempted. It must be left to such persons to form their own contracts and engagements, and this Court has only to sit here and construe them, and also to lay down certain general rules for the

(1) L. R. 6 Ch. 567. (2) (1842) 1 Y. & C. Ch. 326.

protection of persons who may not have been aware of what the consequences would be of intrusting their property to the management of others where nothing is expressed as to the implied arrangement. . . . . Is it possible to read that clause and find any mode by which it could be maintained that the company meant to exclude a director from his office in case he should have an interest in a contract, or to exclude any contract being made in which any director should be interested? It seems to me to be perfectly impossible. The whole clause would be idle. They have taken the matter into their own hands, and have said: 'We do not mind a director who has an interest, but all that we provide is this—that he shall fairly state that interest at the time when the matter is under discussion. He shall not vote on the matter himself, and if he acquires an interest after the matter has been discussed, and after he has voted upon it, or whether he has voted upon it or not, if after the matter is discussed he acquires an interest which he does not disclose he shall be forthwith disqualified.' That is the rule which they have laid down, and by that rule, as I apprehend, the conduct of Messrs. Knight, Coleman & Co. must be tested in this case." It must always be borne in mind that the Companies Act, 1862, and Table A clearly recognise that this is a matter which may be regulated by the company's articles, and that no question of bargaining out of, or against, the provisions of the Act of Parliament arises.

The wording of the clause I have to deal with here differs from that of the clause dealt with in the case referred to; but the reasoning of Lord Hatherley applies exactly. I hesitated a little on account of the use of the past tense in the clause in the present case, because on a possible construction it might be held to apply only to cases in which prior to the appointment as director a contract had been entered into, but upon consideration I am satisfied that this would be a too narrow, and an unfair meaning to place upon it.

The decision of Lord Hatherley was reversed upon appeal to the House of Lords (1); but, so far as it is material in the present case, it was left untouched.

(1) L. R. 6 H. L. 189.

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Reliance was placed upon a passage in the speech of Lord Cairns, which is to be found at page 205 of the report, where he says: "It was said that this clause, though in terms dealing only with the vacating of the office, impliedly sanctioned the retaining of his interest by a director if he declared it. I will assume in favour of the respondents, but without deciding it, that this is the true construction of the clause." The result of this is, that Lord Cairns leaves the reasoning of Lord Hatherley in respect of the effect of a clause of this description untouched, reserving a right to reconsider the matter.

For these reasons I think the plaintiff company fail in their action, which must be dismissed.

Solicitors: *Norton, Rose, Norton & Co.; Ashurst, Morris, Crisp & Co.*

W. C. D.

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1900
March 15, 20.

In re BOOTH.
PICKARD *v.* BOOTH.

[1899 B. 1394.]

Will—Construction—Die without Child or Children—Without leaving Children—Real Estate—Executory Gift over—Conveyancing Act, 1882 (45 & 46 *Vict. c.* 39), *s.* 10.

A testator gave one-half his estate, which was principally freeholds, to the plaintiff, for her absolute use and benefit, "but should she die without child or children," then over among the defendants. The plaintiff had an infant child:—

Held, that "die without child or children" meant, die without leaving a child or children, and that the plaintiff was now absolutely entitled to one-half the estate, subject to an executory gift over in favour of the defendants, in the event of her not having any child who should survive her, or attain twenty-one in her lifetime.

ADJOURNED SUMMONS.

The question for decision was the meaning in a will of the words "die without child or children." The will, which was very short and home-made, was, so far as material, as follows:—

William Booth, who died in 1897, by his will dated Novem-

ber, 1892, after giving his household furniture to his niece, Helena Swaine, devised and bequeathed his estate to be divided into three parts, "one-half of the whole estate to Helena Swaine for her own absolute use, subject to no control of any husband, but should she die without child or children then her share" went over to other persons named, who were the present defendants.

Helena Swaine married in the testator's lifetime, and was now Mrs. Pickard; the first child of this marriage was born in 1899. Mrs. Pickard took out an originating summons, making the persons interested in default of her having children defendants, for the determination of the question whether, upon the birth of her child, the plaintiff became absolutely entitled to one moiety of the testator's residuary real and personal estate.

With the exception of the furniture, the testator's estate consisted of freehold property.

Rowden, Q.C., and *Hatfield Green*, for the plaintiff. The words in question mean "die without ever having had a child or children"; the plaintiff has had a child, whether it survives or not is immaterial; she is therefore now absolutely entitled. None of the reported cases are exactly in point. *Bacon* v. *Cosby* (1) is in favour of this contention; there is a general rule in favour of making an absolute vesting as soon as possible. In *Jeffreys* v. *Conner* (2) the testator in another part of his will had used words signifying death without ever having had any children. *In re Hambleton* (3) is very briefly reported and appears hardly to have been argued.

O. L. Clare, and *G. Broke Freeman*, for the defendants. *Jeffreys* v. *Conner* (2) and *In re Hambleton* (3) as far as they go are in our favour; the words "without child or children" must mean without child or children living at her death. The words "without any child" have been construed as meaning without children at the death in *Thicknesse* v. *Liege* (4) and *Hughes* v. *Sayer*. (5) The authorities, so far as they point to

(1) (1851) 4 De G. & Sm. 261.
(2) (1860) 28 Beav. 328.
(3) W. N. (1884) 157.
(4) (1775) 3 Bro. P. C. 365.
(5) (1718) 1 P. Wms. 534.

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any rule at all, are in favour of construing the words in question as without child or children living at the death; this construction, too, is in strict analogy with s. 29 of the Wills Act, by which the expression "die without issue" is now construed as equivalent to "die without leaving issue." In common parlance, a "childless" woman means one who leaves no child, not one who has never had one. If the Court is in favour of this contention we ask for a declaration defining the executory limitation over in accordance with the Conveyancing Act, 1882, s. 10.

[Jarman on Wills, 5th ed. p. 1056, and Theobald, 4th ed. p. 575, were referred to.]

Rowden, Q.C., in reply.

BYRNE J., after reading the words of the will as set out above, continued:—The question is, whether the words "should she die without child or children" mean, should she die without having had a child or children, or do they mean, should she die without a child or children living at her death. It will be observed, of course, that there is no gift in the will to the child or children of this niece; but it may well be that a testator meaning to provide for his niece, and to give her power to provide for her child or children, would wish the estate to vest as soon as possible in order that she might be able to dispose of it. Undoubtedly, the words used are of an ambiguous character, and in the present case, as is agreed on both sides, I have no context to afford any assistance in the matter. It is said, on the one hand, that the authorities, so far as they point to any rule at all, are in favour of construing these words as meaning without child or children living at her death. On the other hand it is suggested that there is a general rule in favour of making an absolute vesting as soon as possible, especially when it is intended to enable the parent to make some provision for his family. I have looked at many of the authorities with the assistance of counsel, and although there is the case of *Jeffreys* v. *Conner* (1), in which the words "and should my son Charles and my daughter Eliza die with-

(1) 28 Beav. 328.

out any child or children" were held to mean die without child or children living at the death, still that case is open to the remark that there occurred in the same will an expression of the testator's signifying death without ever having had any children. I am, therefore, thrown back upon the words of the will. I think, having regard to the form of expression used, that the true meaning is, "die without child or children then living," that is, at the time of her death. I admit that the case is one of some difficulty, but that, in my opinion, is the construction to be put on the words, and I will therefore make a declaration, that the plaintiff is now absolutely entitled to one-half of this estate, subject to an executory gift over in favour of the defendants, in the event of her not having any child who should survive her, or attain twenty-one in her lifetime.

Solicitors: *Peacock & Goddard, for Younge, Wilson & Co., Sheffield.*

W. C. D.

In re BEDDINGTON. MICHOLLS *v.* SAMUEL.

[1899 B. 3176.]

Will—Gift within Twelve Months of Death—Ademption—Estate Duty—Advancement—Account—Finance Act, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 9, *sub-s.* 1.

A testator, within one year of his death, spent 4000*l.* on the purchase of house, which he settled on one of his daughters, and contributed 4320*l.* towards the purchase of another house for another daughter; the Court having decided that these gifts must be considered as an ademption pro tanto of the daughters' shares in the testator's residuary estate, which must be brought into account:—

Held, that the amount for which the daughters were accountable was the sums so advanced, less the amount they were liable to pay for estate duty by reason of the death of the testator within one year of the gift.

ADJOURNED SUMMONS.

This was an application by the trustees of the will of the late Maurice Beddington, for the opinion of the Court upon

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several questions arising in the administration of his estate, but the only one requiring any notice in this report was, whether legatees who had to account for advances made to them by the testator within one year of his death were entitled to deduct the estate duty payable in respect of these advances, or were to be charged with the whole sum advanced. The will and the facts, so far as material, were as follows:—

The testator by his will, dated March 30, 1896, directed his residuary estate, which was chiefly personalty, to be divided into as many shares as he had daughters living at his death, or should have predeceased him leaving a child or children living at his death, and then settled each share on the daughter for life without power of anticipation, and after her death on her children in the usual way.

In May, 1897, the testator expended a sum of 4000*l.* in the purchase of a leasehold house as a residence for one of his married daughters, Mrs. Fanny Charlotte Behrens; and by a settlement of June 20, 1898, the testator assigned this house to trustees upon trusts in favour of his said daughter, her husband, and children.

In July, 1898, the testator also contributed a sum of 4320*l.* towards the purchase of another leasehold house as a residence for another married daughter, Mrs. Ada Rachel Micholls. This house, on completion of the purchase, was assigned direct to Mr. Micholls.

In September, 1898, the testator died, and, the estate being a very large one, estate duty was payable at 8*l.* per cent.

The Court having decided, on the evidence produced on this application, that the purchase and gift of the two leasehold houses by the testator to his two married daughters ought to be considered as an ademption pro tanto of their respective shares in the residuary estate, which must be brought into account, the question now arose as to the exact amount to be charged to each of these daughters' shares, namely, the whole sum so advanced, or the sum less estate duty.

Norton, Q.C., and *Alexander*, for the trustees. By reason of the death of the testator within twelve months from the

making of these gifts to his daughters, the property comprised therein is "property passing on the death of the deceased" under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), and has to pay estate duty; the duty is a charge on these houses under s. 9, sub-s. 1; under these circumstances the question arises as to the exact amount to be charged against each daughter.

Rowden, Q.C., and *Wood Hill*, for Mrs. Behrens and Mrs. Micholls. We now have to pay estate duty on these advances in the events which have happened; therefore the value of the advance for which we must account is the sum advanced less the estate duty: that correctly represents the actual benefit we have received. The object of making us account is equality; if, therefore, some deduction is not allowed we shall get less than the others.

Levett, Q.C., and *Fawcus*, for daughters who had not been advanced. These two houses were made over to the donees subject to a contingent liability to pay estate duty if the testator died within one year from making the gift. The gift was made with all its burdens and advantages, and the donees had to take their chance; now that estate duty has become payable they wish to get the benefit of the gift without bearing the burden. The daughters must be charged with the whole sum, just as in the case of any other advancement.

BYRNE J. In this case a novel and somewhat difficult point arises by reason of the death of the donor of certain property within one year from the gift: the consequence of which is that the property given is chargeable with estate duty under the Finance Act, 1894, s. 2, sub-s. 1 (*c*), and s. 9, sub-s. 1. It is a question turning on the meaning and operation of the doctrine of ademption. I have held that the daughters who benefited by the gifts are bound to bring into account the value of the benefit received from such gifts before sharing in the rest of the estate. The question of ademption never arises until the death of the donor; then, if it be held that the gift is to be treated as an advance, you have to ascertain the amount or value of that advance which has to be brought in.

When these gifts were made they were subject to a liability

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to estate duty which might arise in the event of the death of the donor within the year; when the donor died within the year, it was no longer a question of actuarial valuation as to the probable amount of this contingent liability, but you had to ascertain the value of the gift which had been made to each daughter. It appears to me that these advances were advances of property liable to be charged with duty in a certain event: that event having happened, the value of the property so advanced was decreased by the amount which thus became a charge upon it, and therefore the amount to be brought into account by each daughter is the value of the sum so advanced after deducting the estate duty, which became a charge on the property so given.

Solicitors: *Montagu, Mileham & Montagu.*

W. C. D.

BYRNE J. 1900 *April* 3, 4.

In re LORD CLIFDEN. ANNALY *v.* AGAR-ELLIS.

[1900 C. 234.]

Mortgage of Policy of Assurance—Surrender of Policy—Real Property Limitation Act, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Payment "in the meantime"—Payment by Mortgagor or his Agent.*

In 1871 A. mortgaged a contingent reversionary interest in certain property together with a policy of assurance on his own life for 2500*l.* for securing the sum of 2500*l.* The mortgage contained the usual covenants for payment of the principal and interest with power of sale and surrender of the policy.

A. never made any payment in respect of the principal or interest of the mortgage debt, nor paid any of the premiums on the policy, which was kept up by the mortgagee.

In 1893 the mortgagee surrendered the policy to the office for the sum of 1468*l.* 14*s.* A. had no notice of the surrender.

The mortgagee died in 1895 and A. died in 1899.

Held, in an action by the representative of the mortgagee against the representatives of A., claiming that the security might be enforced, that the receipt by the mortgagee of the surrender value of the policy was not a payment of principal or interest within the meaning of s. 8 of the Real

Property Limitation Act, 1874, so as to entitle the plaintiff to recover on the covenant contained in the mortgage.

In re Conlan's Estate, (1892) 29 L. R. Ir. 199, discussed.

The words "in the meantime" in the section include a period between the time of the commencement of the action or suit and a time when the remedy for the debt would otherwise have been barred.

Harty v. *Davis*, (1850) 13 Ir. L. Rep. 23, approved.

By an indenture dated February 13, 1871, Leopold G. F. Agar-Ellis, afterwards Viscount Clifden, in consideration of 2500*l.* advanced to him by the trustees of the will of Henry, Viscount Clifden, out of moneys belonging to them as trustees for Henry George, Viscount Clifden, mortgaged certain contingent reversionary interests and also a policy for 2500*l.* on his own life in the Sun Life Insurance Company as security for the advance, and entered into the usual covenants for payment thereof; and it was thereby agreed that, if the trustees should receive any moneys by virtue of the policy, they or he should out of the same in the first place reimburse themselves or himself, or pay or discharge all costs and expenses incurred in obtaining payment of and receiving the same, and in the next place pay or apply such moneys in or towards satisfaction of the moneys for the time being owing on the security, and then pay the surplus (if any) of the said moneys to the said Leopold, Viscount Clifden. The deed also contained a joint account clause and the ordinary provisions for keeping up the policy, with power after August 13, 1871, to sell the premises thereby assigned, either together or in parcels, and either by public auction or private contract, and as to the said policy of assurance by way of surrender to the office by which the same might have been granted; and it was declared that the mortgagees or their assigns should, by and out of the moneys which should arise from any such sale, in the first place reimburse themselves all the costs and expenses incurred in or about the sale, and in the next place apply such moneys in or towards satisfaction of the moneys for the time being owing on the security of that indenture, and then pay the surplus (if any) to the said Leopold, Viscount Clifden, his heirs, executors, administrators, or assigns. And it was also declared that the power of sale might be exercised by any person or persons who for the time

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being should be entitled to receive and give a discharge for the moneys owing on the security of that indenture.

The mortgagor never made any payment on account of the mortgage debt or interest, nor paid any of the premiums on the policy, which were paid by the mortgagees, and on Henry George, Viscount Clifden, attaining his majority on September 2, 1884, he became absolutely entitled to the said mortgage debt and the securities therefor as part of his Clifden estates, and he subsequently executed a disentailing assurance, and thereby defeated the contingent reversionary interest of Leopold, Viscount Clifden, in the hereditaments mortgaged by the deed of February 13, 1871.

In the year 1893 Henry George, Viscount Clifden, decided to realize the above-mentioned policy of assurance, which was accordingly surrendered to the office on September 6, 1893, for the sum of 1468*l.* 14*s.*, which sum Henry George, Viscount Clifden, received and disposed of. No notice of any kind was given to Leopold, Viscount Clifden, of such surrender.

Henry George, Viscount Clifden, died in the year 1895, and Leopold, Viscount Clifden, thereupon succeeded to the title and died in the year 1899.

This was a summons taken out by the surviving administrator with the will annexed of Henry George, Viscount Clifden, against the defendants as executors of the will of Leopold, Viscount Clifden, for the determination of the question whether the above-mentioned mortgage could or ought to be enforced against the estate of the said Leopold, Viscount Clifden, and, if so, for any and what sum or sums.

The point having arisen whether this was a question that could properly be heard on summons, it was arranged that a writ should be issued pro formâ asking that the securities might be enforced.

George Lawrence, for the plaintiff. The real question is whether the remedy on the covenant contained in the mortgage deed is barred by s. 8 of the Real Property Limitation Act, 1874, which provides that no action or suit shall be brought to recover any sum of money charged on land, but

within twelve years next after a present right to receive the same shall have accrued to some person capable of giving a discharge for or a release for the same, unless in the meantime some part of the principal money or some interest thereon shall have been paid, or some acknowledgment of the right thereto, shall have been given in writing signed by the person by whom the same shall be payable or his agent to the person entitled thereto or his agent. A payment must be by a person liable to pay—that is, the mortgagor or his agent: *Chinnery* v. *Evans* (1); *Harlock* v. *Ashberry* (2); *Lewin* v. *Wilson* (3); and the question is whether the receipt by the mortgagee of the surrender value of the policy is a payment by the mortgagor, and I submit that it operates as a payment within the meaning of the section: *In re Conlan's Estate.* (4)

The words "in the meantime" in the section refer to a period intermediate between the time when the present right has accrued and the commencement of the action: *Harty* v. *Davis.* (5)

J. T. Prior, for the defendants. The receipt of money by a mortgagee from a person not a party to the mortgage contract, but being a payment in respect of property the subject-matter of the mortgage, although it would have to be brought into account as between mortgagor and mortgagee, is not a payment of principal or interest within the meaning of the section, nor a payment by a person connected with the mortgage within the meaning of the cases referred to. The payment was not a payment at all by the mortgagor, or an agent of the mortgagor, or by a person bound to make payment of principal or interest on his behalf. To be a payment within the section it must be made by the mortgagor or his agent, or at least by a person bound or entitled to make a payment of principal or interest for the mortgagor: *Chinnery* v. *Evans* (1); *Harlock* v. *Ashberry.* (2) As in the latter case payment of rent by a tenant of the mortgaged property to the mortgagee was held not to be a payment of principal or interest within the section,

(1) (1864) 11 H. L. C. 115.
(2) (1882) 19 Ch. D. 539.
(3) (1886) 11 App. Cas. 639.
(4) 29 L. R. Ir. 199.
(5) 13 Ir. L. Rep. 23.

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so in the present case the payment of the surrender value of the policy by the insurance office to the mortgagee was not a payment of principal or interest. The case of *In re Conlan's Estate* (1), which is a decision holding that the payment of the policy moneys to the mortgagee kept the security alive, is not reconcilable with *Harlock* v. *Ashberry* (2) and the other cases cited, which were not referred to in the judgment of Monroe J., and in fact that part of his judgment was not required for the decision.

The words "in the meantime" define a period between the date of the commencement of the action and a date so far anterior that, if the payment or acknowledgment had not been subsequent to it, the remedy for the debt would have been barred.

George Lawrence, in reply.

[The following cases were also referred to: *Hugill* v. *Wilkinson* (3); *In re Frisby* (4); *Sutton* v. *Sutton* (5); *In re Hale* (6); *London and Midland Bank* v. *Mitchell.* (7)]

BYRNE J. In this case the real point raised is whether the remedy by action on the covenant contained in a mortgage deed is barred by reason of lapse of time; or whether what has happened since has amounted to a payment of principal money within the meaning of s. 8 of the Real Property Limitation Act, 1874, so as to revive the right to sue. [His Lordship then stated the facts, and continued:—]

It is argued that the receipt of the policy moneys operates as a payment within the meaning of the section. [His Lordship read the section, and continued:—] With reference to the words "unless in the meantime some part of the principal money or some interest thereon shall have been paid," I think that the words "in the meantime" must include the period between the time of the action or suit being brought and the time when the remedy for the debt would otherwise have

(1) 29 L. R. Ir. 199.
(2) 19 Ch. D. 539.
(3) (1888) 38 Ch. D. 480.
(4) (1889) 43 Ch. D. 106.
(5) (1882) 22 Ch. D. 511.
(6) [1899] 2 Ch. 107.
(7) [1899] 2 Ch. 161.

been barred. I think the decision in the Irish case to which I have been referred of *Harty* v. *Davis* (1) is well founded, and I must express my agreement with it.

The other branch of the argument turns really on the meaning of the decisions in *Chinnery* v. *Evans* (2), *Harlock* v. *Ashberry* (3), and *Lewin* v. *Wilson*. (4)

In *Chinnery* v. *Evans* (2) Lord Westbury says (5): "Money paid, that is money handed over, by a stranger to the contract under which it was paid, to the individual entitled to receive it, would not have the characteristics and the legal quality of payment. It would be a voluntary render; a gift or donation, being made by a party not in any respect subject to liability, to the individual who would not be entitled to receive from the person so rendering it any part of the money which it is supposed would be so paid." In *Harlock* v. *Ashberry* (3), where it was held that payment of rent by a tenant of the mortgaged property to the mortgagee was not such a payment as to take the case out of the statute, Sir G. Jessel says (6): "It is said in the first place it is not a payment of principal or interest, and secondly, that in order to be a payment within that statute it must be made by a person liable to pay principal or interest, and in this case it was not made by a person liable to pay principal or interest. I do not think that this was a payment of principal or interest at all"; and he says (7): "Therefore on principle and on authority I think that the payment to take the case out of the statute must be a payment by a person who is bound to pay the principal or interest of the mortgage money, and this is not such a payment." Again, in *Lewin* v. *Wilson* (4), Lord Hobhouse in delivering judgment says this (8): "In this case their Lordships think it sufficient to say that payments made by a person who under the terms of the contract is entitled to make a tender, and from whom the mortgagee is bound to accept a tender, of money for the defeasance or redemption of the mortgage, are payments which by s. 30" (Act

(1) 13 Ir. L. Rep. 23.
(2) 11 H. L. C. 115.
(3) 19 Ch. D. 539.
(4) 11 App. Cas. 639.
(5) 11 H. L. C. 133.
(6) 19 Ch. D. 544.
(7) Ibid. 546.
(8) 11 App. Cas. 646.

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of New Brunswick) "give a new starting point for the lapse of time." And again, referring to the judgment appealed from, he says (1): "The principle he finds to be established by authority is, that the only person by whom a payment can be made to stay the currency of the statute, is the mortgagor, or some person in privity of estate with him, or the agent of one of them."

From these authorities it appears to me clear that the payment to take the case out of the statute must not be a payment by a stranger, but must be a payment by a person who is entitled to pay the principal or interest of the mortgage money. There is but one authority in which the point now before me has been discussed. I refer to the case of *In re Conlan's Estate.* (2) Now, without going through the facts of that case, I find Monroe J. says (3): "It is alleged that no part of the principal and no interest has ever been paid on foot of either of the two mortgages since the date of their respective execution. It is perfectly true that no payment of principal or interest has ever been directly made by the mortgagor; but the mortgage vested in Sir Francis G. M. Boileau and his co-mortgagees was secured by a policy for 2000*l.* on the life of W. J. Conlan, which had been duly assigned by him to them. On the death of W. J. Conlan the amount of this policy was realized by the mortgagees, and put to the credit of the mortgage on January 24, 1875. The petition in this matter was filed on March 14, 1885, and the absolute order for sale made on the 31st, so that twelve years had not elapsed between the payment of the policy and the order for sale when the statute ceased to run. This mortgage is therefore an existing security." It has been pointed out by counsel for the defendants that it is consistent with the facts as stated in *In re Conlan's Estate* (2) that there may have been some other matter which had a bearing on that finding. I am unable myself to reconcile it, so far as it can be considered as applicable to the present case, with the decision of the Court of Appeal in *Harlock* v. *Ashberry.* (4) It appears to me that when the statute has once run and the

(1) 11 App. Cas. 647.
(2) 29 L. R. Ir. 199.
(3) 29 L. R. Ir. 208.
(4) 19 Ch. D. 539.

twelve years have elapsed, the realization of the property by the mortgagee after that date does not amount to and cannot be construed as a payment by the mortgagor or his agent, or by some person entitled by virtue of the contract to make a tender of the money to a person bound to accept it. I therefore come to the conclusion that the plaintiff is not entitled to recover on the covenant, and the action must be dismissed.

Solicitors: *Foyer & Hordern; Norton, Rose, Norton & Co.*

G. M.

EASTWOOD BROTHERS, LIMITED *v.* HONLEY URBAN DISTRICT COUNCIL.

[1899 E. 1298.]

Local Government—Sewers—Prescriptive Right of Drainage—Trade Effluents—Polluting Liquid—Public Health Act, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 21—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 17, *sub-s.* 1—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7, 16—*West Riding of Yorkshire Rivers Act*, 1894 (57 & 58 *Vict. c. clxvi.*), *ss.* 9, 10.

Where the owners of buildings have acquired a right to discharge drainage into a public sewer through a connection lawfully made, that right extends to the discharge of trade and manufacturing effluents, and the provisions of s. 7 of the Rivers Pollution Prevention Act, 1876, do not justify a local sanitary authority in cutting off the connection with their sewer, even although it is shewn that the discharge of the trade effluent prejudicially affects the disposal of the sewage matter conveyed through the sewer.

The decision of Charles J. in *Peebles* v. *Oswaldtwistle Urban Council*, [1897] 1 Q. B. 384, on this point followed.

THE plaintiff company were the owners in fee of land and mills at Honley, near Huddersfield, known as Thirston Mills, where they carried on the business of woollen and worsted manufacturers. They acquired the property in 1890 as successors in title to a firm of Eastwood Brothers, who in their turn had derived title through a firm of Dearnley, Drury & Co.

In the year 1853 a drain was constructed from the mills, which carried the trade effluent discharged in the processes of

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manufacture into a ditch or channel known as Thirston Dyke; that channel discharged into a drain known as the May Brook, and so into the river Holme. There was no interruption in the user of that drain for trade effluents so long as it discharged into the Thirston Dyke.

In the year 1885 the Honley Local Board, which at that time was the local sanitary authority for the district within which the mills were situated, projected and carried out a sewerage system, under which they constructed a sewer near the Thirston Dyke, and, as it appeared from the evidence, the workmen of the board, without any special directions and without previous communication with the then owners of Thirston Mills, took up the drain from the mills at the point where it met the new sewer, and made a connection between them; so that from 1885 to the present time the drain had ceased to discharge into Thirston Dyke, and the effluent from the mills had passed through the sewer into the river Holme.

Thirston Mills had since 1853 been from time to time enlarged, and there was some evidence to the effect that the volume of the trade effluent had increased in recent years, but that there had been no material change in its character.

Under the Local Government Act, 1894, the Honley Local Board became the Honley Urban District Council.

In 1896 a joint committee was formed of the Honley Urban District Council and the South Crosland Urban District Council for the purpose of making main sewers for the two districts, and in 1897 that committee acquired land for the construction of outfall and purification works.

Under a Provisional Order of April 10, 1897, a joint sewerage board was constituted which superseded the joint committee, but its duties and functions affected only main sewers made by the joint board, and sewers already made by either of the two district councils remained vested in and under the control of the council in whose district they were situated.

The defendant council, being advised that the discharge of the trade effluent from Thirston Mills into their sewer was, on account of its temperature and for other reasons, prejudicially affecting the disposal of the sewage matter and exposing them

to liabilities under the Rivers Pollution Prevention Act, 1876, had recently informed the plaintiffs of their intention to cut off the connection between the sewer and the drain from Thirston Mills.

The plaintiffs accordingly commenced this action, claiming an injunction to restrain the defendants from disconnecting the drain in accordance with their threat.

The action was tried without pleadings and upon affidavit evidence.

The various statutory provisions which were referred to in the arguments and judgment are as stated in the note. (1)

(1) Public Health Act, 1875 (38 & 39 Vict. c. 55), s. 17: "Nothing in this Act shall authorise any local authority to make or use any sewer drain or outfall for the purpose of conveying sewage or filthy water into any natural stream or watercourse, or into any canal pond or lake until such sewage or filthy water is freed from all excrementitious or other foul or noxious matter such as would affect or deteriorate the purity and quality of the water in such stream or watercourse or in such canal pond or lake."

Sect. 21: "The owner or occupier of any premises within the district of a local authority shall be entitled to cause his drains to empty into the sewers of that authority on condition of his giving such notice as may be required by that authority of his intention so to do, and of complying with the regulations of that authority in respect of the mode in which the communications between such drains and sewers are to be made, and subject to the control of any person who may be appointed by that authority to superintend the making of such communications. . . . ."

Public Health Acts Amendment Act, 1890 (53 & 54 Vict. c. 59), s. 17: "(1.) Every person who turns or permits to enter into any sewer of a local authority or any drain communicating therewith,

"(*a*) Any chemical refuse, or

"(*b*) Any waste steam, condensing water, heated water, or other liquid (such water or other liquid being of a higher temperature than one hundred and ten degrees of Fahrenheit),

which, either alone or in combination with the sewage, causes a nuisance or is dangerous or injurious to health, shall be liable to a penalty not exceeding ten pounds, and to a daily penalty not exceeding five pounds."

Rivers Pollution Prevention Act, 1876 (39 & 40 Vict. c. 75), s. 4: "Every person who causes to fall or flow or knowingly permits to fall or flow or to be carried into any stream any poisonous, noxious, or polluting liquid proceeding from any factory or manufacturing process shall (subject as in this Act mentioned) be deemed to have committed an offence against this Act.

"Where any such poisonous, noxious, or polluting liquid as aforesaid falls or flows or is carried into any stream along a channel used, constructed, or in process of construction at the date of the passing of this Act,

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Levett, Q.C., and *Waggett*, for the plaintiffs. The defendants are not entitled to disconnect the Thirston Mill drain from the sewer. In 1885 the then owners of the mills had acquired a prescriptive right to discharge their trade effluent from their drain into Thirston Dyke and so into May Brook. The right was not affected by the circumstance that in and since the year 1885 the effluent was carried by the local sanitary authority through their sewer into the brook: Public Health Act, 1875, s. 21; Rivers Pollution Prevention Act, 1876, s. 4; West Riding of Yorkshire Rivers Act, 1894, s. 9, sub-s. 2.

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or any new channel constructed in substitution thereof, and having its outfall at the same spot, for the purpose of conveying such liquid, the person causing or knowingly permitting the poisonous, noxious, or polluting liquid so to fall or flow or to be carried shall not be deemed to have committed an offence against this Act if he shews to the satisfaction of the Court having cognizance of the case that he is using the best practicable and reasonably available means to render harmless the poisonous, noxious, or polluting liquid so falling or flowing or carried into the stream."

Sect. 7: "Every sanitary or other local authority having sewers under their control shall give facilities for enabling manufacturers within their district to carry the liquids proceeding from their factories or manufacturing processes into such sewers:

"Provided that this section shall not extend to compel any sanitary or other local authority to admit into their sewers any liquid which would prejudicially affect such sewers or the disposal by sale, application to land, or otherwise, of the sewage matter conveyed along such sewers, or which would from its temperature or otherwise be injurious in a sanitary point of view:

"Provided, also, that no sanitary authority shall be required to give such facilities as aforesaid where the sewers of such authority are only sufficient for the requirements of their district, nor where such facilities would interfere with any order of any court of competent jurisdiction respecting the sewage of such authority."

Sect. 16: "The powers given by this Act shall not be deemed to prejudice or affect any other rights or powers now existing or vested in any person or persons by Act of Parliament, law, or custom, and such other rights or powers may be exercised in the same manner as if this Act had not been passed; and nothing in this Act shall legalise any act or default which would but for this Act be deemed to be a nuisance or otherwise contrary to law: Provided nevertheless, that in any proceedings for enforcing against any person such rights or powers the Court before which such proceedings are pending shall take into consideration any certificate granted to such person under this Act."

West Riding of Yorkshire Rivers Act, 1894 (57 & 58 Vict. c. clxvi.), ss. 9, 10: In terms identical with ss. 4 and 7 of the Rivers Pollution Prevention Act, 1876, above set out.

The connection made in 1885 must be presumed to have been properly made: *Bethnal Green Vestry* v. *London School Board.* (1)

The right of the plaintiffs is an absolute right: *Ainley* v. *Kirkheaton Local Board* (2); and it extends to trade effluents: *Peebles* v. *Oswaldtwistle Urban Council.* (3)

Such effluents in fact are contemplated by the terms of the statutes: Public Health Act, 1875, s. 17; Public Health Acts Amendment Act, 1890, s. 17, sub-s. 1.

When once such a connection as in the present case has been authorized or permitted, or the prescriptive right to discharge has been acquired, the sanitary authority cannot cut it off: *Attorney-General* v. *Dorking Union.* (4)

Asquith, Q.C., and *Clayton*, for the defendants. The burden is on the plaintiffs to shew that the connection of the drain with the sewer ought to be maintained.

The connection has been in existence since 1885 under a revocable licence. The defendants are in no way estopped from revoking that licence if they find the continuance of it is inconsistent with the fulfilment of their own statutory obligations. Their primary duty is to render effective a system of sanitary sewage, and they could estop themselves by any act or conduct inconsistent with the performance of that duty.

Assuming that the plaintiffs' predecessors had in the year 1885 acquired a prescriptive right to discharge their trade effluents into the May Brook, that right enured only as against the other riparian owners, and did not warrant the committing of a nuisance. Sect. 4 of the Rivers Pollution Prevention Act, 1876, refers only to an offence against that particular statute, and does not affect the general law or other statutory provisions as to nuisance.

No prescriptive title has been acquired in the period since 1885.

The plaintiffs found their alleged right on s. 21 of the Public Health Act, 1875; but the answer is that such right is only to

(1) [1898] A. C. 190.
(2) (1891) 60 L. J. (Ch.) 734; W. N. (1891) 50.
(3) [1897] 1 Q. B. 384.
(4) (1882) 20 Ch. D. 595.

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empty from a drain into a sewer ordinary sewage matter and not trade effluents.

The decision of Charles J. in *Peebles* v. *Oswaldtwistle Urban Council* (1) on the point as to trade effluents is not correct. It ignored s. 7 of the Rivers Pollution Prevention Act, 1876. That section would not have been enacted if s. 21 of the Public Health Act, 1875, conferred the right contended for.

Levett, Q.C., in reply. The Rivers Pollution Act, 1876, did not take away, but on the contrary, by s. 16, preserved the rights under the Public Health Act, 1875. The provisions of the Rivers Pollution Prevention Act, 1876, were not disregarded in the case of *Peebles* v. *Oswaldtwistle Urban Council*. (1)

Cur. adv. vult.

April 7. BYRNE J. The plaintiffs' predecessors in title had a right to cause their drain to empty into the sewer of the local authority now vested in the defendant district council: see *Ainley* v. *Kirkheaton Local Board* (2) and *Brown* v. *Dunstable Corporation* (3), and the plaintiffs have a right to continue so to cause their drain to empty into the same sewer under s. 21 of the Public Health Act, 1875.

Having regard to the circumstances under which the connection of the plaintiffs' drain with the defendants' sewer was originally made, and to the length of time during which the state of things so initiated has continued, I am of opinion that I ought to hold, as I do, that the connection was duly and lawfully made.

The plaintiffs' predecessors were, and the plaintiffs now are, entitled to empty through their drain into the sewer in question, not merely sewage matter, but manufacturing effluents: see *Peebles* v. *Oswaldtwistle Urban Council* (1); reversed (4), but not on any point material to the present case.

Under these circumstances the plaintiffs are in my judgment entitled to an injunction to restrain the defendants from cutting

(1) [1897] 1 Q. B. 384.
(2) 60 L. J. (Ch.) 734; W. N. (1891) 50.
(3) [1899] 2 Ch. 378.
(4) [1897] 1 Q. B. 625.

off as they threaten to do the communication between the plaintiffs' drain and the defendants' sewer: see amongst other cases *Attorney-General* v. *Clerkenwell Vestry* (1) and cases there cited.

Having regard to the provisions of s. 16 of the Rivers Pollution Prevention Act, 1876, I do not think that s. 7 of that Act gives power to the defendants to stop up the communication in question, even if it had been proved beyond question (as it has not in fact been proved) that the liquid discharged from the drain into the sewer would prejudicially affect the disposal by sale, application to land, or otherwise of the sewage matter conveyed along the sewer. The defendants may or may not be entitled to some other remedy against the plaintiffs in respect of the effluent discharged into the sewer: I express no opinion upon the point, which does not arise in this action; but I am of opinion that the plaintiffs are entitled to an injunction to restrain interruption of the communication of the drain with the sewer.

Solicitors: *Van Sandau & Co., for Mills & Co., Huddersfield; Jaques & Co., for Armitage, Sykes & Hinchcliffe, Huddersfield.*

(1) [1891] 3 Ch. 527.

G. M.

COZENS-HARDY J.

1900

Jan. 18, 19, 26.

WOOLSTON *v.* ROSS.

[1899 W. 3881.]

Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19 (*iii.*), 24, *sub-ss.* 1, 2, 3—*Mortgage—Receiver—Distress.*

Where a receiver of the rents of mortgaged property has been appointed by the mortgagee, the mortgagor cannot distrain without the receiver's authority even after the receiver has refused to do so.

ACTION claiming an injunction and damages for unlawful distress.

The plaintiffs were Woolston and Kelly, the assignee and assignor of a lease of a house granted by the defendant Ross for a term of twenty-one years from Christmas, 1896, at the annual rent of 320*l.* The defendant was owner of the equity of redemption of the property under a mortgage made since 1881. A dispute arose between the parties as to whether the first quarter's rent was owing. All subsequent rent was duly paid.

The assignment from Kelly to Woolston was made in July, 1899. On July 12, 1898, the mortgagee, under s. 19 (iii.) of the Conveyancing Act, 1881, had appointed a receiver of the rents and income of the leasehold property comprised in the mortgage. Notice of the appointment was on the same day served upon the plaintiff Kelly, which notice had never been withdrawn, and all rent subsequently accruing was paid to the receiver. In 1899 the question was again raised whether rent for the quarter ending Lady Day, 1897, was due. The receiver took counsel's opinion as to how he ought to act. Counsel advised him not to distrain, being of opinion that the receiver was not bound to embark on doubtful legal proceedings which might result in his having to pay costs. This opinion was communicated to the defendant. The receiver declined to distrain or to authorize the defendant to distrain; he said he would leave the defendant to take such proceedings as he should think fit, but he added that, if the defendant recovered any arrears

of rent, they must be paid over to the receiver. Thereupon the defendant in his own name put in a distress for 80*l.*, and the plaintiffs commenced this action. The plaintiff Kelly paid 80*l.* into court, and the distress was withdrawn.

It was now admitted that 68*l.* and no more, part of the first quarter's rent, was due.

Eve, Q.C., and *E. A. Nepean*, for the plaintiffs. After the appointment of the receiver and notice to the tenant, the only person that could give a discharge or distrain for rent, including back rent (*Moss* v. *Gallimore* (1)), was the receiver, who did not and could not delegate his authority. There cannot be two persons able to distrain at the same time: *Ward* v. *Shew* (2); *Waddilove* v. *Barnett* (3); *Bayly* v. *Went.* (4) It is only where the mortgagor is left in possession that he is entitled to distrain: *Trent* v. *Hunt* (5); Bullen on Distress, 2nd ed. p. 81.

Buckmaster, for the defendant. Some rent was due; it does not make the distress, if it was otherwise legal, illegal because more was distrained for than was actually due.

The receiver could have distrained in the name of either mortgagor or mortgagee; he is made by the Act agent of the mortgagor; it may be that, though the receiver is agent of the mortgagor and can distrain in his name, till the receiver has refused to distrain, the mortgagor cannot himself distrain; when, however, the receiver has refused to distrain, the mortgagor is relegated to his right to get the rent in by distress himself. If this were not so, there would be rent due, to the advantage of which the mortgagor would be entitled, and which might be lost, for the Statute of Limitations might run, and the mortgagor be deprived of all remedy. This is not a case in which the receiver would be liable for negligence: after having taken the opinion of counsel he was justified in not himself distraining.

The status of the receiver under the Conveyancing Act, 1881,

(1) (1779) 1 Sm. L. C. 10th ed. 497; 1 Doug. 279.
(2) (1833) 9 Bing. 608; 35 R. R. 640.
(3) (1836) 2 Bing. N. C. 538.
(4) (1884) 51 L. T. 764.
(5) (1853) 9 Ex. 14.

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is a peculiar one: he is the creation of a new statute; he is made by statute the agent of the mortgagor though appointed by the mortgagee; this is to prevent the consequences of the mortgagee taking possession. The true position may be that the possession of the agent of the mortgagor does not deprive his principal of all the rights he would have had under the old law. Till the mortgagee took possession he would undoubtedly have had power to distrain.

If the distress was illegal, it was justified by the assent of the receiver afterwards given: Woodfall on Landlord and Tenant, 16th ed. p. 495; *Lamb* v. *Mills* (1); *Trevillian* v. *Pine*. (2)

Eve, Q.C., in reply.

Jan. 26. COZENS-HARDY J. The question for my decision is whether the distress was illegal. Now it is plain that until after July 12, 1898, the defendant had a right to distrain. It is equally plain that after that date, and so long as the notice was not withdrawn, the receiver had a statutory power of distress under the Conveyancing Act. It has not been seriously contended that there were two persons, namely, the defendant and the receiver, having concurrent rights to distrain for the same arrears of rent. But it has been argued that the defendant's right was only in suspense, and that if and when the receiver elected to stand aside the defendant's right to distrain immediately revived. On the other hand, it has been argued that the receivership has never been terminated, that the statutory power of distress was in full force, that even if such a power could be delegated, which is denied, there was no delegation proved, and that the only authority given by the receiver to the defendant was an authority to collect the arrears if he could upon the terms of handing the money to the receiver. Now it is settled law that an authority by the legal reversioner to a third person to receive rents from tenants for his own benefit does not entitle that person to distrain in the name of the legal reversioner: *Ward* v. *Shew*. (3) The legal rever-

(1) (1694) 4 Mod. 377. (2) (1707) 11 Mod. 112.
(3) 9 Bing. 608; 35 R. R. 640.

sioner would not be liable for any wrongful distress put in by such third person. It is no doubt true that a person who having authority, express or implied, to distrain for rent due to the legal reversioner, distrains as for rent due to himself, may justify as bailiff to the legal reversioner: *Trent* v. *Hunt*. (1) But in the present case authority to distrain is negatived, and the defendant cannot justify as bailiff of the receiver. In my opinion, so long as the receivership is in force and the notice to the tenant is not withdrawn, no valid distress can be levied except by the receiver or by some person, including the mortgagor, authorized by him. The statute says that the receiver may distrain in the name either of the mortgagor or of the mortgagee, but it does not say that the mortgagor may himself distrain without any authority from the receiver. The position of the receiver under the statute is peculiar. Though appointed by the mortgagee, he is deemed to be the agent of the mortgagor, and the mortgagor is solely responsible for the receiver's acts and defaults. Yet the mortgagor cannot discharge his agent; this can only be done by the mortgagee by writing under his hand. It is a fallacy to suggest that the mortgagor, as principal, can exercise the statutory power vested in his agent, the receiver.

The result is that, in my opinion, the distress was illegal. An order has been made that the distress should be withdrawn on payment into court by the plaintiffs of 80*l*. It is not therefore necessary for me to grant an injunction.

Solicitors: *J. G. Dalzell; Downey & Linnell.*

(1) 9 Ex. 14.

D. P.

COZENS-HARDY J.

1900

March 16.

In re QUEEN'S HOTEL COMPANY, CARDIFF, LIMITED.

[1898 Q. 44.]

In re VERNON TIN PLATE COMPANY, LIMITED.

[1898 V. 560.]

Company—Debenture-holder's Action—Costs.

The plaintiff in a debenture-holder's action is allowed party and party costs of action only.

THESE were two debenture-holders' actions brought on together on further consideration to determine on what scale the plaintiffs' costs of action ought to be taxed.

In the case of the Queen's Hotel Company, Cardiff, Limited, there were two series of debentures, each secured by the intervention of trustees of a covering deed. The plaintiffs, the London and Provincial Bank, Limited, were holders of first debentures. The assets of the company had been realized, and were found to be more than sufficient to pay the first debenture-holders in full, but insufficient to pay the second debenture-holders in full.

In the case of the Vernon Tin Plate Company, Limited, there were three sets of debentures, each charged directly on the assets of the company.

The plaintiffs were the London and Provincial Bank, Limited, holders of first debentures.

The assets were sufficient to pay the holders of the first debentures in full; it was not certain whether they were sufficient to pay the second debenture-holders in full; they were not sufficient to pay all the debenture-holders in full.

Stewart-Smith, for the plaintiffs in the first action, and

J. G. Wood, for the plaintiffs in the second action. The plaintiffs' actions have been for the benefit of all persons interested in the assets; they have realized what there was to

realize to the best advantage; it would be only fair that they should be recouped the money actually expended by them. A plaintiff debenture-holder's position is more analogous to that of a plaintiff creditor in an administration action than to that of a mortgagee plaintiff. He cannot get foreclosure: *In re Continental Oxygen Co.* (1) The rule in an administration action is laid down in *In re McRae* (2); before creditors of a postponed class can get the benefit of proceedings by a specialty creditor, the specialty creditor's costs between party and party are allowed.

J. S. Green, for the trustees of the covering deeds.

Eustace Smith, for holders of second debentures in the first company, and

G. S. Alexander, for holders of second and third debentures in the second company. These actions are mortgagees' actions simply, and the rule as to costs in a mortgagee's action is and always has been that a plaintiff mortgagee can only get as costs of action costs on the party and party scale. It may be that the plaintiffs may be entitled to some contribution from their co-debenture-holders.

Stewart-Smith, in reply.

COZENS-HARDY J. The question really is, What are the rights of a mortgagee plaintiff in dealing with the mortgaged property in a suit? It is quite clear that a mortgagee plaintiff is only entitled to party and party costs of action; there is no vestige of authority to the contrary; nor does it make any difference, so far as I am aware, that he asks for sale and not foreclosure. There might be a mortgagee who was only entitled to a sale; in such case he would only be entitled to party and party costs. Although by sale the mortgaged property is realized, the plaintiff would only be entitled to principal and interest and party and party costs. Does it make any difference that the plaintiff is suing on behalf of himself and all others of the same rank? I cannot see what difference that can make. The plaintiff, after all, is only a person entitled to an equitable charge.

(1) [1897] 1 Ch. 511, 516. (2) (1886) 32 Ch. D. 613.

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QUEEN'S HOTEL COMPANY, CARDIFF, LIMITED, *In re.*

VERNON TIN PLATE COMPANY, LIMITED, *In re.*

The very point came before Romer J., sitting in chambers for Wright J. (Jan. 28, 1895), in the case of *Industrial and General Trust, Limited* v. *South American and Mexican Co.* [1893 B. 3558]. Application was there made for solicitor and client costs, and also for taxation on the higher scale. I have been furnished by the master with the following note of what took place: "I will not depart from the usual practice, which it is admitted before me is this—tax the costs between party and party; and I see no reason for taxing costs on a higher scale. If I made any exception in this case, and gave solicitor and client costs and costs on a higher scale, I should have to do so in every case." That seems to me a decision exactly in point. But it is said I ought to treat this, not as an ordinary mortgage action, but as analogous to *In re McRae* (1) and other cases in which it was held that where an estate of a dead person is not sufficient to pay all creditors in full, although sufficient to pay in full creditors of a particular class, a plaintiff creditor is entitled to solicitor and client costs, and that I ought to follow the principle established there. I do not think that has any application. The rules applicable to the administration of the estate of a deceased person have, I think, no relation to a mortgage suit, whether by an individual mortgagee or by one of a class suing on behalf of all. There is a sense in which every mortgaged property realized in an action is realized for the benefit of the puisne mortgagees and the mortgagor. I cannot make an exception in favour of the plaintiffs in these actions which, so far as I am aware, would be novel.

Solicitors: *Munns & Longden; Smiles & Co.; Bell, Brodrick & Gray; Tamplin, Tayler & Joseph.*

(1) 32 Ch. D. 613.

D. P.

SHUTTLEWORTH *v.* MURRAY.

COZENS-HARDY J.

1900

March 17, 20, 29.

[1875 S. 174.]

Will—Construction—Eldest Son entitled to Possession.

A will limited successive life estates in Blackacre to members of a class, other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents of Whiteacre as tenant for life or a greater estate. A tenant in tail in remainder of Whiteacre joined with his father, the tenant for life, in a sale of which he had the benefit:—

Held, that on the death of his father he became an eldest son within the exception, and incapable of succeeding to a life estate in Blackacre under the limitations of the will.

EDMUND GRIMSHAW, by his will dated January 29, 1855, devised his real estates in the county of Lancaster to certain uses which have ceased or failed to take effect, and subject thereto to the use of his nephew Richard Atkinson and his assigns during his life without impeachment of waste (other than and except wilful waste), and from and immediately after the decease of the said Richard Atkinson to the use of his nephew Francis Frederick Brandt and his assigns during his life without impeachment of waste (other than and except wilful waste), and from and immediately after the decease of the said F. F. Brandt to the use of all and every the son and sons of the said F. F. Brandt who should be born in the testator's lifetime, or in due time after, and all and every the son or sons of the said Richard Atkinson then living, and who should be born in the testator's lifetime or in due time after (other than and except an eldest or only son for the time being entitled to the possession or to the receipt of the rents, issues, and profits of certain estates situate within the parish of Cockerham in the said county of Lancaster after the decease of the said Richard Atkinson as tenant for life, or any greater estate or interest whatsoever), severally and successively in remainder one after another, and as between each branch as they and every of them should be in seniority of age and priority of birth, but as between the two branches alternately and turn by turn and their assigns during their several and respective lives without

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impeachment of waste (other than and except wilful waste), the eldest or only one of such sons or son of the said F. F. Brandt taking the first turn, and the eldest or only one of such sons or son of the said Richard Atkinson (other than and except as aforesaid) taking the next turn, and so successively changing from one branch to another. With limitations over, under which, in the events which happened, the remainder in fee became vested in Richard Atkinson.

The testator died in 1875. F. F. Brandt died in the lifetime of the testator without having married. Richard Atkinson had several children, the eldest of whom, Richard Norton Atkinson, was born on February 17, 1847. At the date of the disentailing assurance of 1869 mentioned below Richard Atkinson was tenant for life, and Richard Norton Atkinson was tenant in tail male in remainder of the Cockerham estate. By a disentailing deed dated January 16, 1869, and duly enrolled in Chancery and made between the said R. Atkinson of the first part, the said R. N. Atkinson of the second part, and William Thomas Sharp of the third part, the Cockerham estate was limited to such uses as the said R. Atkinson and R. N. Atkinson should jointly appoint. By a deed dated January 19, 1869, the estate was jointly appointed by the father and the son to trustees upon trust for sale. By another deed dated January 19, 1869, it was declared that the trustees should stand possessed of the purchase-money after payment off of certain incumbrances upon trust to pay 7000*l.* to the said R. Atkinson, and should invest the remainder and stand possessed of it upon certain trusts under which the said R. N. Atkinson took certain benefits. The estate was subsequently sold by the trustees, who received the purchase-money.

In 1870 R. N. Atkinson became bankrupt, and his interest both in the purchase-money of the Cockerham estates and his interest under the testator's will were acquired by his father Richard Atkinson from the trustee in bankruptcy. Richard Atkinson died recently, and this summons was taken out to determine whether R. N. Atkinson was excluded under the exception of an eldest son for the time being entitled to the possession or receipt of the rents, &c., of the Cockerham estates.

Vernon Smith, *Q.C.*, and *Northcote*, for trustees, the plaintiffs to the summons.

Swinfen Eady, *Q.C.*, and *E. S. Ford*, for the second son of Richard Atkinson. R. N. Atkinson would have been, but for his own acts, the person literally fulfilling the terms of the exception. He has had the full benefit of his position as such, and is within the meaning of the exemption according to the decisions: *Collingwood* v. *Stanhope* (1); *Domvile* v. *Winnington*. (2)

Hon. E. C. Macnaghten, *Q.C.*, and *Hon. T. H. Watson*, for persons entitled to the interest of R. N. Atkinson. The exception is to be construed strictly and literally, and refers to an eldest son in possession at the time of the life estate falling in. R. N. Atkinson was not then, and never had been entitled to the possession of or the receipt of the income of the Cockerham estates: *Fazakerly* v. *Ford* (3); *Harrison* v. *Round* (4); *Leslie* v. *Earl of Rothes* (5); *Meyrick* v. *Laws*. (6)

Swinfen Eady, *Q.C.*, in reply.

COZENS-HARDY J. (after stating the facts as above). It is necessary to decide who is entitled to the estate devised by the will of the testator. On the one hand it is argued that R. N. Atkinson is excluded from the class. On the other hand it is argued that he is not excluded, because in fact he never did become entitled to the possession or to the receipt of the rents and profits of the Cockerham estate.

The words of exception are technical words which have received an accepted construction for many years. The most common case in which these words occur is where portions are charged upon a settled estate by the instrument creating the settlement, and it has been repeatedly held that the object of the clause is to prevent the person who succeeds to the estate from getting any share of the portion fund, with the result that a person who is in fact the eldest son, but who does not come into possession of the estate, is not regarded as an eldest

(1) (1869) L. R. 4 H. L. 43.
(2) (1884) 26 Ch. D. 382.
(3) (1831) 4 Sim. 390; 33 R. R. 129.
(4) (1852) 2 D. M. & G. 190.
(5) [1894] 2 Ch. 499.
(6) (1874) L. R. 9 Ch. 237.

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son within the meaning of these words. This construction is applied to a legal devise: *In re Bayley's Settlement* (1), and it is not limited to marriage settlements. I see no reason why these technical words should not have the same meaning in the present case. It remains, however, to consider whether R. N. Atkinson is or is not within the exception. I think this question must be answered in the affirmative. It seems to me that he accurately answers the description of an eldest son for the time being entitled to the possession of the Cockerham estate after the decease of his father as tenant in tail.

It is, however, urged that, inasmuch as by reason of the disentailing deed the Cockerham estate has been sold, it cannot be said of R. N. Atkinson that he ever was entitled to the possession or receipt of the rents and profits of that estate. I think this is a fallacy. He has by his own act had the full benefit of the estate, the purchase-money for which was dealt with according to his direction.

The case of *Collingwood* v. *Stanhope* (2) is very much in point. [His Lordship stated the facts of that case, and read the following extract from the judgment of Lord Westbury:—] "I beg your Lordships' attention to this—that in the description contained in this settlement of the person who is to be ascertained at the period of distribution there are two things to be observed. The one is the age of the individual, and his relation to his parents and his brothers and sisters in point of birth—that is the relation which will stamp upon him naturally the character of being elder or younger. But there is superadded to that another thing, namely, his being 'eldest, second, or only son for the time being entitled under the said will'—'for the time being' belongs to 'eldest, second, or only son'; 'entitled under the said will' is a thing superadded. It is quite right to say that you must refer to the time of distribution for the purpose of ascertaining who at that time, that is, for the time being, is the 'eldest, second, or only son.' But neither the authorities, nor the reason of the thing, require you to refer to that time for the purpose of ascertaining, or rather for the purpose of requiring, that the individual upon whom you stamp the character of being 'eldest, second, or only son,

(1) (1871) L. R. 6 Ch. 590. (2) L. R. 4 H. L. 43.

shall also be at that particular time entitled to the estate in question. There is no necessity for doing any such thing. You must find that that individual who at the particular period of time answers the character is also the person who is, or has become, entitled to the estate. And if it were otherwise I think the most absurd consequences would ensue. A man, acting with his father, may have sold the estate only the day before the death of his father, and received the purchase-money, and put it in his pocket; and then, in defiance of all reason and common sense, we are to hold him to be a person that does not answer to the description of being entitled to the estate, because on the day subsequent to his full enjoyment and full possession of the entirety of that estate the father dies, and the period of distribution arrives. My own opinion is that the fact of the father and son joining in an act of disposition, in order to prevent the devolution of the estate, was intended to be met in the clause by the words 'or in remainder immediately expectant on the decease of the said Edward Collingwood,' because this would be the result—as soon as a person is found to be for the time being the eldest or only son, and also to be entitled in remainder immediately expectant, a disqualification attaches to him, prospectively and contingently, on his answering to the character of 'eldest or only son' at the time of distribution. And it would be absurd enough to hold that if a disqualification is attached to him, the circumstance of his selling the estate, or making a different disposition of it, having thereby had the full enjoyment of it, shall restore him to the category and to the class of persons entitled to the benefit of other property from which we find that he has been already excluded." (1) [His Lordship also referred to the judgment of Lord Cairns (2) in the same case.]

In *Domvile* v. *Winnington* (3) a trust fund was appointed in 1852 in trust for Lady Winnington for life, and after her death "in trust for the child, if only one, or all the children, *except an eldest* or only son, if more than one, of my daughter Lady

(1) L. R. 4 H. L. at pp. 58, 59. (2) L. R. 4 H. L. 62, 63.
(3) 26 Ch. D. 382.

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Winnington." It will be observed that there was no reference to any settlement, or to any particular property which the "eldest or only son" would take. There was in fact a family estate under which the eldest son of Lady Winnington was tenant in tail male in remainder. In 1869 the eldest son joined his father in barring the entail, and the estates were limited to the appointees of both or of the survivor, subject to an annuity of 500*l.* to the son during their joint lives. The son died shortly afterwards in the lifetime of his father, who appointed the estates by will. Kay J., although it was not perhaps necessary for his decision, assumed a state of facts identical with the present case. He says (1): "If I were to assume that in the provision made by Sir Compton Domvile for the younger children of Lady Winnington, the exception of an eldest or only son was, because of his being entitled to the family estate under the settlement of his father, and if I were at liberty to read 'eldest or only son' as 'eldest or only son for the time being entitled to the estate settled by his father's marriage settlement,' Thomas, the eldest son, having joined in the disentailing deed under which he took benefits, must be treated as having had and enjoyed the estate, and he would be excluded."

Reference was made to *Fazakerly* v. *Ford* (2) and *Harrison* v. *Round* (3) as being inconsistent with the view which I have indicated. I do not so regard them; on the contrary, I think they both tend to support this view, although they are not so directly in point as *Collingwood* v. *Stanhope* (4) and *Domvile* v. *Winnington.* (5)

I must, therefore, declare that R. N. Atkinson is excluded, and that his next surviving brother is now entitled to the rents and profits of the devised estates.

Solicitors: *Collyer-Bristow & Co., for Shuttleworth & Dallas, Preston; Robins, Hay, Waters & Hay; Collyer-Bristow & Co.*

(1) 26 Ch. D. 386.
(2) 4 Sim. 390; 33 R. R. 129.
(3) 2 D. M. & G. 190.
(4) L. R. 4 H. L. 43.
(5) 26 Ch. D. 382.

D. P.

In re CARTER. DODDS *v.* PEARSON.

[1900 C. 438.]

COZENS-HARDY J.

1900

March 23, 29.

Will—Mortgagee in Possession—Conveyancing and Law of Property Act, 1881 (44 & 45 *Vict. c.* 41), *s.* 30—*Executor—Specific Devise by Executor beneficially entitled to Mortgage Debt.*

A mortgagee in possession of freehold houses devised and bequeathed all his estate to his wife, and appointed her his sole executrix. By a codicil to her will she devised these houses specifically:—

Held, that the mortgage debt passed to the specific devisee.

By a deed dated May 23, 1888, two freehold houses, numbered 24 and 26, George Street, Thornaby-on-Tees, with a stable at the rear, were mortgaged to Thomas Carter to secure 500*l.* and interest at 5 per cent. The mortgagor became bankrupt. In November, 1897, Thomas Carter entered into possession of the mortgaged property, and possession has ever since been retained by him and persons deriving title under him. Prior to November, 1897, a puisne mortgagee had been in possession, but he gave up possession to Thomas Carter because there was no margin. Thomas Carter died in June, 1899, having devised and bequeathed all his real and personal estate to his wife Martha Carter and appointed her sole executrix. Martha Carter on July 3, 1899, made a codicil to her will in the following words: "I devise" (inter alia) "my two houses and stable in George Street, Thornaby-on-Tees, to my friend, James Dodds, of Stockton-on-Tees, in fee simple." She died in the month of July, 1899.

This was a summons by James Dodds to determine whether he was entitled to the mortgage debt, or whether it belonged to the residuary legatee under Martha Carter's will.

Eve, Q.C., and *St. John Clerke*, for James Dodds. Whether a devise of a particular estate by a mortgagee passes the beneficial interest in the debt is a question of intention. The fact that the mortgagee has described the property and was in

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possession points to her having intended to pass whatever interest she had. The cases are collected in 1 Jarman on Wills, 5th ed. p. 643. There could have been no object in making this devise or bequest except to confer a benefit: *Woodhouse* v. *Meredith* (1); *Burdus* v. *Dixon* (2); *In re Lowman.* (3)

Micklem, Q.C., and *J. G. Wood*, for the residuary legatee. As a general rule a devise of mortgaged property by the mortgagee does not pass the beneficial interest in the debt. Here the testatrix was not in possession as mortgagee: she had the legal interest as executrix of her husband. We submit that the debt did not pass: *In re Clowes* (4); *Strode* v. *Russel* (5); *Casborne* v. *Scarfe* (6); *Chandler* v. *Pocock.* (7)

March 29. COZENS-HARDY J. (after stating the facts). It is admitted that the description in the codicil of the testatrix applies to the houses comprised in the mortgage of 1888, and the question for my decision is whether James Dodds, the plaintiff, is entitled to the mortgage debt secured on the property, or whether it forms part of the residuary estate of the testatrix which is given to the defendant.

In my opinion the plaintiff is entitled. The testatrix was in possession of this property, and the devise was intended to pass and sufficed to pass such interest as she had, which was not that of an owner in fee, but was that of a mortgagee. This seems to me to be consistent with the decisions of Sir W. Grant in *Woodhouse* v. *Meredith* (1), and of Stuart V.-C. in *Burdus* v. *Dixon* (2), and of the Court of Appeal in *In re Lowman.* (3) In the last case Lindley L.J. (8) uses language which is singularly appropriate to the present case: "What, after all, is a devise of land? It is only a devise of such estate or interest as the devisor has in the land, and primâ facie whatever estate or interest the testator has in land will pass under a devise of it by that name, if it is specifically referred to so as to shew that the testator had that particular

(1) (1816) 1 Mer. 450; 15 R. R. 145.
(2) (1858) 6 W. R. 427.
(3) [1895] 2 Ch. 348.
(4) [1893] 1 Ch. 214.
(5) (1701) 2 Vern. 621, 624.
(6) (1737) 1 Atk. 603.
(7) (1881) 16 Ch. D. 648.
(8) [1895] 2 Ch. 354.

land in his mind, and if there is nothing else to answer the description."

But it was argued that this view is inconsistent with the decision of the Court of Appeal in *In re Clowes.* (1) In that case the testator specifically devised some freehold property. He afterwards sold the property, taking a mortgage for part of the purchase-money. He died without altering his will. It was held that the mortgage debt passed under a residuary bequest, and did not pass to the specific devisee. It will be observed that the testator was not mortgagee in possession, and the observations of the Master of the Rolls must be read with reference to the facts of that case. The position of a mortgagee in possession is peculiar. The tenants are his tenants, and he is their landlord. He treats himself as owner, and unless and until redeemed he naturally regards himself as owner. I cannot doubt that Mrs. Carter intended to give to the plaintiff all her interest in this property the rents and profits of which were being received by her, and there is no rigid rule of law which precludes me from giving effect to this intention.

I must, therefore, declare that the plaintiff is entitled to the mortgage debt.

Solicitors: *Warriner & Co., for A. H. Sill, Middlesborough; Williamson, Hill & Co.*

(1) [1893] 1 Ch. 214.

D. P.

COZENS-HARDY J.

1900

March 30.

In re WHITEHEAD & BROTHERS, LIMITED.

Companies Act, 1862 (25 & 26 *Vict.* c. 89), s. 23—*Memorandum of Association*—*Companies Act*, 1867 (30 & 31 *Vict.* c. 131), s. 25—*Companies Act*, 1898 (61 & 62 *Vict.* c. 26), s. 1—*Double Allotment.*

The certificate of incorporation of a company operates as the issue of shares subscribed for on the memorandum of association.

Circumstances under which (distinguishing *In re Jarvis & Co.*, [1899] 1 Ch. 193) shares subscribed for on the memorandum of association of a company were held to be the same as shares subsequently applied for by and allotted to a vendor as fully paid up.

Under those circumstances the Court ordered the company to file a contract to take the shares as fully paid up, which should operate as a sufficient contract to satisfy s. 25 of the Companies Act, 1867, and as if it had been filed on or before the issue of the shares.

THE certificate of incorporation of the above company was dated August 9, 1870.

The first object of the company was to acquire a woollen manufacturing business and certain mills belonging to Ralph Radcliffe Whitehead, which property was described in a draft agreement set out in an introduction to the articles of association and referred to in the memorandum of association. The nominal capital of the company was 130,000*l.* divided into 1300 100*l.* shares.

Ralph Radcliffe Whitehead subscribed the memorandum of association in respect of 1068 shares. The other 232 shares were subscribed for by the other signatories on the memorandum.

The agreement was expressed to be made between Ralph Radcliffe Whitehead, as vendor of the one part, and the company as purchaser of the other part. It provided for the sale of the business and mills at the price of 130,000*l.*, of which 106,800*l.* was to be paid in 1068 fully paid-up shares. The agreement was duly executed on October 21, 1870, and was registered on October 27, 1870. After registration of the agreement, 1068 shares, numbered from 1 to 1068, were allotted to Ralph Radcliffe Whitehead as fully paid up. All the other shares in the company were issued and paid up. The articles

contained power for the directors of the company to allot new capital when authorized to be raised, but were silent as to the allotment of the original capital. Ralph Radcliffe Whitehead died in March, 1871, having settled his shares by will in such a way that they could be dealt with only upon the death of his widow. She had recently died, and the testator's estate had become distributable. The question arose whether, inasmuch as he had signed the memorandum of association in respect of the 1068 shares, his estate was not liable to have his shares treated as not fully paid up, by reason of the fact that no contract had been filed previously to the issue of the shares. The personal representative of the testator now moved that the company might be ordered to file a sufficient memorandum of a contract to take the shares as fully paid up in the form scheduled or some other form, and that an order might be made that the memorandum should operate as if it were a sufficient contract within the meaning of s. 25 of the Companies Act, 1867, and had been filed at or before the issue of such shares.

The form scheduled to the notice of motion was: "Be it remembered that 1068 fully paid shares of 100*l.* each numbered 1 to 1068 inclusive in the above-named company were issued to Ralph Radcliffe Whitehead of Amberley Court Stroud in the county of Gloucester woollen manufacturer and cotton spinner (since deceased) in satisfaction of the sum of 106,800*l.*, part of the consideration of the sum of 130,000*l.* agreed to be paid by the company to the said R. R. Whitehead for the sale to the company of all those several mills and factories."

Theobald, Q.C., and *Bunting*, for the applicant. The necessity of the application arises from the effect of two decisions: *Dalton Time Lock Co.* v. *Dalton* (1), where it was held that the issue of the certificate of incorporation of a company operated as the allotment of the shares signed for on the memorandum, and a decision of Romer L.J. when a judge of first instance in *In re Jarvis & Co.* (2), a case somewhat similar to the present. The applicant in that case subscribed the

(1) (1892) 66 L. T. 704. (2) [1899] 1 Ch. 193.

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memorandum for 6500 shares, and subsequently sold property for 6500 shares which were allotted to him as fully paid, and Romer J. held that there were two allotments of 6500 shares. That case is distinguishable in this—that there was nothing on the memorandum and articles themselves to shew that the vendor subscribed for shares as part of purchase-money; and there were shares not taken up more than sufficient to provide for the double allotment.

Eve, Q.C., and *E. S. Ford*, for the company.

COZENS-HARDY J. I think Mr. Theobald is entitled to the relief he asks. I think this case is distinguishable from that decided by Romer J. There can be no difficulty in identifying the shares registered in the name of R. R. Whitehead as being the same shares as those subscribed for by him on the memorandum.

I think for his protection there should be something in the order making this clear. I will preface the order by a recital that "the Court being of opinion that the 1068 shares, numbered 1 to 1068, referred to in the agreement of October 27, 1870, are the shares for which R. R. Whitehead subscribed the memorandum."

I do not say anything about costs.

Solicitors: *Johnson, Weatherall & Co.*

D. P.

FOAKES *v.* JACKSON.

FARWELL J.

1900

March 6.

[1899 F. 662.]

Power—Execution—Limited Power—Joint Donees—Conveyance by one Donee and Persons entitled in Default—Concurrence of other Donee—Respective Estates and Interests—No Reference to Power—Power in Defeasance—Implied Release.

Any dealing with an estate by the donee of a power inconsistent with the exercise of that power releases it.

A husband and wife had a joint power, and subject thereto the survivor had a separate power, to appoint property among certain objects. The husband and wife and the persons entitled in default of appointment executed a deed whereby the wife (with her husband's consent) and those persons according to their several and respective estates and interests as beneficial owners assigned the property to an object. The joint power was not referred to. The wife died, and the husband appointed the property to other objects:—

Held, that, whether or not the deed of assignment operated as a joint appointment, and (*semble*) it did so operate, it released the husband's separate power, and his subsequent appointment was inoperative.

In re Hancock, [1896] 2 Ch. 173, applied.

WITNESS ACTION.

This was an action for an account of a trust estate.

By marriage settlements of December 22, 1858, the *Ipswich Journal* was settled in trust for the wife for life for her separate use without power of anticipation, and after her decease as to one moiety in trust for the defendant Jackson, the wife's son by a former marriage, for life, and after his death upon trust for his children, who being sons should attain the age of twenty-one years, or die under that age leaving issue, or being daughters should attain that age or be married, and in default of such children upon the trusts of the second moiety. And as to the second moiety upon trust for the husband for life, and after his decease upon trust for Jackson and the children or issue of the marriage in such shares as the husband and wife should by deed jointly appoint, and in default of such appointment as the survivor should by deed or will appoint, and in default of such appointment upon trust for Jackson if he should attain the age

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of twenty-one years or die under that age leaving issue, and for the children of the marriage who being sons should attain the age of twenty-one years or die under that age leaving issue, or being daughters should attain that age or be married, and equally among Jackson and such children.

The husband became bankrupt in 1867, and his interest under the settlements became vested in the trustee for his creditors.

Jackson attained twenty-one on August 16, 1875.

There were only two children of the marriage—namely, a daughter who died an infant and unmarried, and a son who attained twenty-one in December, 1881.

By an indenture dated June 14, 1886, and made between the husband and wife of the first part, Jackson of the second part, the son of the third part, and Jackson of the fourth part, reciting that in July, 1883, it was agreed that the wife, Jackson, and the son, being the parties then beneficially entitled to the *Ipswich Journal*, should assign the same unto Jackson for his own absolute use, subject as thereinafter mentioned; and reciting that in pursuance of the agreement the premises were in July, 1883, handed over to Jackson, and he had since that time been in occupation thereof, and had managed and conducted the same, but no formal deed had been executed; it was witnessed that in pursuance of the agreement the wife (with the consent of her husband) and Jackson and the son, according to their several and respective estates and interests as beneficial owners, assigned the *Ipswich Journal* unto Jackson for his own use and benefit. And in further pursuance of the agreement Jackson covenanted after the death of the wife to pay the son one fourth part of the net profits of the premises thereby assigned yearly on December 31 in every year. And Jackson was empowered, at his absolute discretion and without the consent of the son, to mortgage the premises for the purpose of carrying on or improving the same, or for the payment of debts due or to accrue due in respect thereof, or for any other purpose whatsoever, it being the intention of the parties thereto that Jackson should be at liberty to deal with the premises as the absolute owner thereof, subject only to his paying over to

the son one fourth part of the net profits in manner hereinbefore mentioned. And the wife (with the consent of her husband) and the son ratified and confirmed all transactions and proceedings done, made, executed, and taken by Jackson since July, 1883, in reference to the premises. This deed was executed by all the parties and duly attested.

The wife died on November 18, 1892, intestate.

The plaintiffs, the infant children of the son, claiming under a deed of appointment by the husband dated February 28, 1899, denied that the deed of 1886 had vested the property beneficially in Jackson, and asked for an account against Jackson, and to have any loss made good by the defendant trustees.

The defendants, relying on the deed of 1886 as an execution of the joint power, or alternatively as a release of the husband's power, objected that the later appointment of the husband was inoperative, so that the plaintiffs had no right to sue.

This point, being in the nature of a preliminary objection, was argued at the commencement of the case.

Bramwell Davis, Q.C., *Rawlinson, Q.C.*, and *T. T. Methold*, for the defendant Jackson. The deed of 1886 shews a clear intention to pass the *Ipswich Journal* to Jackson absolutely, subject to the provision for the son. The joint power is, therefore, executed: Farwell on Powers, 2nd ed. p. 191. In any case, the concurrence of the husband amounts to a release of his power: Farwell on Powers, 2nd ed. p. 16; *In re Hancock* (1); *In re Lyons and Carroll's Contract.* (2) On either construction the plaintiffs have no title.

J. G. Wood, for one defendant trustee.

P. M. Walters, for the other defendant trustee.

W. F. Hamilton, Q.C., *Griffith Jones*, and *Morgan Griffith-Jones*, for the plaintiffs. There is no reference to the power either expressly or by implication. The parties assign as beneficial owners according to their several estates and interests. There is no authority that an assignment of that nature can execute a limited power. Again, the husband did

(1) [1896] 2 Ch. 173, 183. (2) [1896] 1 I. R. 383.

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not assign at all. His concurrence in his wife's assignment could not execute the joint power, nor could it amount to a release of his own power. In any case the property was only assigned to Jackson for purposes of management. If an absolute assignment was intended, the power of mortgaging would have been unnecessary.

FARWELL J., after referring to the settlements of 1858 and to the deed of 1886, and pointing out that the recital in the deed of 1886 as to the wife, Jackson, and the son "being the parties then beneficially entitled," which meant absolutely entitled, was correct subject to the birth of future children of the marriage, or of Jackson, and that the power to mortgage was merely engrafted on the covenant to pay the fourth part of the profits to the son so as to give Jackson power to mortgage in spite of that covenant, and raised no implication against the assignment being absolute, continued:—In my opinion the deed of 1886 operated either as an appointment under the joint power, or as a release of the husband's power. It might have been more difficult to hold that it operated as an appointment if the parties entitled in default of appointment had not concurred; but as they and the donees of the power all joined with the intention of passing the property, which could only pass absolutely and indefeasibly by an appointment, the deed could—and I should hold, if necessary to give full effect to the deed, that it did—operate as an appointment. But the better ground for holding that the plaintiffs have no title, having regard to the recitals and form of the deed, is that the deed of 1886 operated as a release of the husband's power. In *In re Hancock* (1) a husband had power to appoint a fund by deed amongst his children subject to a proviso empowering him by deed or will to appoint one-fourth of the income to his wife for life. He irrevocably appointed one-fourth of the income by deed to his first wife for life, and subject thereto he appointed the fund by two deeds to his three children. The first wife having died, the husband married again and appointed one-fourth of the income to his second wife for life. The

(1) [1896] 2 Ch. 173, 183.

Court of Appeal held that the last appointment was ineffectual, and Lindley L.J. approved the proposition that any dealing with the estate by the donee of a power inconsistent with the exercise of the power must put an end to it. When once the conclusion was reached that the husband had appointed to the children without reserving a power of revocation, it followed that there was a release of any power to appoint to a future wife. In the present case all the persons interested intended to transfer the property to Jackson absolutely, subject to the provision for the son, and, whether the deed operated by appointment or release, the plaintiffs have no title, and their action must be dismissed with costs.

Solicitors: *A. M. Griffith-Williams; Walters, Deverell, Walters, Wood & Walters; H. O. Soutter.*

G. R. A.

FOSTER *v.* GLOBE VENTURE SYNDICATE, LIMITED.

[1899 F. 376.]

Practice—Evidence—Status and Boundaries of Foreign State—Judicial Cognizance—Application to Foreign Office.

The Court takes judicial cognizance not only of the status, but also of the boundaries of foreign States, and if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose reply is conclusive.

THE plaintiff claimed rescission of the contract made by him with the defendant company by which he agreed to take and pay for 2000 shares of 1*l.* each in the defendant company, on the ground that he was induced to enter into the contract by the misrepresentations contained in the prospectus issued by the defendant company. The statement of claim (amongst other things) alleged:—

"The said prospectus stated that the defendant company had secured the right to acquire a treaty which was then deposited at the Bank of England in the names of the solicitors

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to the defendant company granted by the Jemnah (1) (Council) of all the independent tribes of Suss conceding the direct trading monopoly over Suss (Morocco) being the entire territories between the Atlas Mountains and the River Nun.

"Whereas in fact the defendant company had secured no right to acquire such treaty or any other treaty, and further the alleged treaty was no treaty and was absolutely invalid and worthless and did not and could not concede such trading monopoly or any rights or privileges whatsoever, and further the tribes of Suss were not independent but were then and now the subjects of the Sultan of Morocco who was then and is now the recognised ruler over the whole of Suss."

By their defence the defendant company asserted the existence of the treaty and that they had secured the right to acquire the same, and denied that the tribes of Suss were not independent, or that they or any of them were the subjects of the Sultan of Morocco, or that he was the recognised ruler over the whole of Suss.

Issue was joined, and the action was set down for trial. The plaintiff now applied by summons, adjourned into court, that a letter might be written by the judge to her Majesty's Secretary of State for Foreign Affairs inquiring, in effect, (1.) whether the tribes of Suss were independent, and (2.) whether the territory called Suss was within the dominions of the Sultan of Morocco.

Hughes, Q.C., and *K. Metcalfe*, for the plaintiff. The Court is bound to know judicially whether a foreign State is or is not recognised as independent by the Crown, and if in doubt will apply to the Secretary of State for Foreign Affairs for information: Daniell's Chancery Practice, 6th ed. p. 72; *Taylor* v. *Barclay* (2); *The Charkieh* (3); *Mighell* v. *Sultan of Johore*. (4) The principle of *Taylor* v. *Barclay* (2) also covers the second question, namely, whether Suss is within the dominions of the Sultan of Morocco.

Bramwell Davis, Q.C., and *R. Neville*, for the defendants.

(1) [*Sic*, but the word, if meant for Arabic, is corrupt or wrongly transcribed.—F. P.]

(2) (1828) 2 Sim. 213; 29 R. R. 82.
(3) (1873) L. R. 4 A. & E. 59.
(4) [1894] 1 Q. B. 149.

The limits of judicial knowledge are well ascertained: Daniell's Chancery Practice, 6th ed. p. 72; Roscoe's Nisi Prius, 16th ed. p. 80; and the Court will not go beyond them. The plaintiff is entitled to request the Court to ask the Foreign Office whether Suss is an independent State; but he is not entitled to ask whether Suss is within the dominions of the Sultan of Morocco. That is a question of boundaries which must be proved by evidence in the usual way.

[They also referred to the Foreign Jurisdiction Act, 1890, s. 4.]

Hughes, Q.C., in reply.

FARWELL J. In this action two of the issues raised are whether the tribes of Suss are independent or are the subjects of the Sultan of Morocco; and whether a tract of land between the Atlas Mountains and the River Nun is the territory of those tribes or is the territory of the Sultan of Morocco. As regards the first question, whether the tribes are independent or not—that is to say, whether they are an independent State—I am bound by the authorities which have been cited to take judicial cognizance whether they are or are not independent, and if my personal knowledge is insufficient to instruct me on that point, then I have the authority of those cases for saying that the proper course is to apply to the Secretary of State for Foreign Affairs for information, and his answer (which is in effect the answer which the Crown condescends to give to judges of the High Court when they ask such a question) is conclusive on the parties. I should, speaking for myself, not allow the answer, assuming it to be a direct answer in the affirmative or negative, to be questioned in any way. I am not sure whether the Court of Appeal in *Mighell* v. *Sultan of Johore* (1) meant to suggest that that could be done; but, speaking for myself, it appears to me that if the Court has judicial knowledge of a fact, that is judicial knowledge without argument, and when once it is stated that it has that knowledge there is an end of it; and when that knowledge is obtained by information direct from the Crown, then it is an a

(1) [1894] 1 Q. B. 149.

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fortiori case. It is still more a knowledge of facts that cannot be disputed.

Then the reasoning in *Taylor* v. *Barclay* (1) appears to me to extend so as to make the second question a proper one for me to put; or, in other words, to make the second point one also on which I ought to be deemed to have judicial knowledge. In that case the Vice-Chancellor, after referring to the case of *Thompson* v. *Powles* (2), says (3): "The judgment proceeded, not on the question whether the Court should give relief or not, or give a discovery or not, or give discovery, and withhold relief; but upon the question whether the King's Courts should attend to the case of a party who founded his case on the representation that certain persons did form an independent government, recognised by this country, when the Government of this country did not so recognise them. It appears to me that sound policy requires that the Courts of the King should act in unison with the Government of the King." Now let me apply that to the second question here. I am asked to take judicial cognizance of the fact that, assuming these tribes to be independent, they do not possess jurisdiction over certain territories. That is a matter which it appears to me must necessarily be within the cognizance of Her Majesty, because, for the protection of her lieges in the ordinary way, she would know whether redress should be applied for to the Sultan of Morocco or to the head of the various independent tribes of Suss. Sound policy appears to me to require that I should act in unison with the Government on such a point as that. Assume that the Foreign Office have already satisfied themselves that the territory in question is within the dominion of Morocco, and have applied to the Sultan of Morocco for redress in any given matter, it would surely be improper that I, sitting here as a judge of the High Court, should, in the face of that act of Her Majesty, hold as a matter of fact that the territory in question was not within the dominion of the Sultan of Morocco. I should be contravening the act of Her Majesty acting as a Sovereign in a matter which is within the cognizance of Her

(1) 2 Sim. 213; 29 R. R. 82. (2) (1828) 2 Sim. 194.
(3) 2 Sim. 221.

Majesty's Foreign Office. I think, therefore, that the reasons given in *Taylor* v. *Barclay* (1) apply to the second question also. I propose to ask the two questions. I need not mention the form in which they will be put. I shall settle the form myself and send the letter direct, and when I have received the answer I will communicate it to the parties.

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Solicitors for plaintiff: *Peacock & Goddard.*
Solicitors for defendants: *Foster Grave & Co.*

H. L. F.

RUDD *v.* LASCELLES.

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March 14.

[1899 R. 1885.]

Vendor and Purchaser—Compensation—Open Contract—Restrictive Covenants—Specific Performance.

The jurisdiction to enforce specific performance with compensation for defects on a vendor, in cases where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock* v. *Buller*, (1804) 10 Ves. 292, 315; 7 R. R. 417, and *Castle* v. *Wilkinson*, (1870) L. R. 5 Ch. 534, 537, namely, that where a vendor has represented and contracted to sell an estate as his own, and the purchaser has relied on the representation, the vendor cannot afterwards be heard to say he has not the entirety.

Compensation for restrictive covenants being incapable of assessment, the relief is inapplicable.

Dictum of Jessel M.R. in *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616, 618, approved and followed.

Semble, to avoid hardship the relief should be confined to cases where the actual subject-matter is substantially the same as that stated in the contract.

WITNESS ACTION.

This was a purchaser's action for specific performance of a contract for sale of four houses, a workshop, garden, and land in Glasgow Terrace, Harrogate, with compensation on the ground of undisclosed restrictive covenants.

The facts proved were as follows:—

The contract was an open contract contained in a correspondence between the plaintiff and defendant in 1899,

(1) 2 Sim. 213; 29 R. R. 82.

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whereby the defendant agreed to sell the property to the plaintiff for 3500*l.*

There was no representation as to the title the defendant could make to the property, nor as to the nature of her interest, nor any provision for compensation for defects. On the investigation of the title it appeared that the property was subject to restrictive covenants as to building and user contained in a deed of October 9, 1876.

The defendant, who had derived the property from her late husband, was, to the knowledge of the plaintiff, practically ignorant as to her title, the deeds being in the hands of mortgagees. She was quite unaware of the existence of any restrictive covenants.

The plaintiff alleged that the restrictive covenants depreciated the value of the property to the extent of 1000*l.*, and claimed specific performance with compensation. Being unable to develop the property as he intended, he was only willing to pay 2500*l.*, being twenty years' purchase of the rental value of the property in its present state, namely, 125*l.* per annum. He stated that he had lost a resale at an advance of 1000*l.*, solely on the ground of the restrictive covenants.

Bramwell Davis, Q.C., and *T. P. Perks*, for the plaintiff. The purchaser can insist on specific performance with compensation, and the objection that the compensation is unascertainable is not willingly entertained or considered insuperable: Fry on Specific Performance, 3rd ed. pp. 548, 564, 572; *Ramsden* v. *Hirst* (1); *Powell* v. *Elliot.* (2)

[FARWELL J. In Dart on Vendors and Purchasers, 6th ed. p. 1193, the author says: "The result then of the authorities appears to be that, except where there is a good defence on the ground of hardship, mistake, or injury to third parties, the Court will insist on a vendor making good his contract to the extent of his ability, and on his submitting to a proportionate reduction of the purchase-money, if the purchaser was ignorant of the defect at the date of the contract, and is willing to complete on these terms."]

(1) (1858) 4 Jur. (N.S.) 200. (2) (1875) L. R. 10 Ch. 424.

In *Westmacott* v. *Robins* (1) the compensation could not be ascertained; *Earl of Durham* v. *Legard* (2) turned on hardship. In the present case the compensation is easily ascertainable.

Hughes, Q.C., and *A. L. Ellis*, for the defendant. It is almost impossible to assess compensation for restrictive covenants: *Cato* v. *Thompson* (3), and therefore it is not a case for cy-près execution: *Thomas* v. *Dering* (4); *Collier* v. *Jenkins*. (5) Where the defect is substantial, specific performance should be refused on the ground of hardship: *Earl of Durham* v. *Legard* (2); Fry on Specific Performance, 3rd ed. p. 573. The restrictive covenants were no detriment to the vendor's enjoyment, and she cannot be taken to have known that the purchaser meant to develop the estate, or be liable for damages not contemplated by the contract. In *Ramsden* v. *Hirst* (6) there was an express condition for compensation, and *Powell* v. *Elliot* (7) turned on misrepresentation.

Bramwell Davis, Q.C., in reply, referred to *Barnes* v. *Wood* (8), *Price* v. *Macaulay* (9), and *Hexter* v. *Pearce*. (10)

FARWELL J. It is plain that the purchaser was aware of the vendor's ignorance as to her own title, and that there was no representation by the vendor leading the purchaser to suppose he would get an absolute fee simple. I am asked to decree specific performance with compensation. I adhere to what I said in *Hexter* v. *Pearce* (10) to the effect that a court of equity will grant the equitable remedy of specific performance in all cases "unless there has been some conduct on the part of the plaintiff disentitling him to the relief in equity, or in some rare instances where there would be a great hardship imposed on an innocent grantor or lessor by reason of some mistake which he has made, although the other party has not contributed to it." In that case both parties contracted with their eyes open, the subject-matter was existing, and there

(1) (1862) 4 D. F. & J. 390.
(2) (1865) 34 Beav. 611.
(3) 9 Q. B. D. 616, 618.
(4) (1837) 1 Keen, 729, 746; 44 R. R. 158.
(5) (1831) You. 295; 34 R. R. 268.
(6) 4 Jur. (N S.) 200.
(7) L. R. 10 Ch. 424.
(8) (1869) L. R. 8 Eq. 424.
(9) (1852) 2 D. M. & G. 339.
(10) Ante, p. 341, 346.

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was no question of compensation. But in this case, if I grant specific performance I shall decree specific performance not of the contract made by the parties, but of a new contract made for them by the Court. To adopt the language of Lord Langdale M.R. in *Thomas* v. *Dering* (1) : "It is impossible not to see that the cy-près execution of the contract which is given in these cases is in fact the execution of a new contract which the parties did not enter into, in which there is no mutuality, and in which there are no adequate means of ascertaining the just price." In the present case the bargain between the parties contains no provision for compensation, such as is now common in conditions of sale. Cases where there is such a provision do not present so much difficulty because compensation is part of the bargain. But here nothing of the sort was contemplated, and if I enforce the contract with compensation I am compelling the vendor to perform a contract into which she did not enter.

In my opinion the jurisdiction to enforce specific performance with compensation on a vendor, where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock* v. *Buller* (2), namely, that a vendor representing and contracting to sell an estate as his own cannot afterwards be heard to say he has not the entirety. It probably first arose in cases of small deficiency in the quantity of the land sold, e.g., if a vendor contracted to sell 100 acres and only had 90 acres he could not resist specific performance on the ground that the contract was to sell 100 acres. This cy-près execution was a purely equitable remedy. This view is borne out by the judgment of Giffard L.J. in *Castle* v. *Wilkinson* (3) : "All those cases in which the contract has been enforced partially and a partial interest has been ordered to be conveyed, have been where the vendor has represented that he could sell the fee simple, and the purchaser has been induced by that representation to believe that he could purchase the fee simple." In the present case there is obviously no direct representation of that kind, and though a mere offer to sell real property primâ

(1) 1 Keen, 729, 746; 44 R. R. 158. (2) 10 Ves. 292, 315; 7 R. R. 417.
(3) L. R. 5 Ch. 534, 537.

facie implies that the vendor has the unincumbered fee simple therein, still, if the purchaser, as in this case, knows that the vendor is ignorant as to the title, he cannot set up any such implication as a representation inducing the contract. The present case, therefore, does not come within the above category.

But I am not compelled to decide the case on that ground alone; there is a further ground which depends on a dictum of Jessel M.R. in *Cato* v. *Thompson* (1), a dictum, I need not say, of very great weight. One ground for refusing specific performance with compensation is the great difficulty of properly assessing the compensation, and in *Cato* v. *Thompson* (1), in which there were restrictive covenants like those in the present case, and the purchaser brought an action to recover his deposit, Jessel M.R. said in answer to an argument that the purchaser ought to complete with compensation: "Now, in the first place, this is not a case for enforcing specific performance on a purchaser with compensation. It is almost impossible to assess compensation for covenants of this nature. I think that the cases of specific performance with compensation ought not to be extended. In many of them a bargain substantially different from that which the parties entered into has been substituted for it and enforced, which is not right. I think this not a case for compensation."

I entirely and respectfully agree with every word of this statement. In my opinion the Court should confine this relief to cases where the actual subject-matter is substantially the same as that stated in the contract, and should not extend it to cases where the subject-matter is substantially different. In the present case specific performance with compensation could not be enforced on the purchaser, as there was no provision that he should accept compensation, and the defect by his own shewing is substantial, and so substantial that if he succeeded in this action he would not be getting that which he thought he had contracted to buy. He says in his second requisition: "The restrictions must be released so as to allow the purchaser to use the vacant land at the back of the houses in any way he may

(1) 9 Q. B. D. 616, 618.

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think proper, *the purchase having been made solely for the purpose of developing the vacant land.* The purchaser has agreed to give a much higher price for the property than he would have done had he known of the restrictive and other covenants contained in the conveyance of October 9, 1876."

Further, the compensation could not be fairly ascertained. If I am to make a new contract for the parties, I must see that it is at a fair price; but I do not ascertain this if I merely find out what would be the value of the property if it were subject to no restrictions, and how much less it is worth because of the restrictions. It would be necessary to find out further what the purchaser would have given and what the vendor would have taken for it under the altered conditions. Now, according to the plaintiff's own shewing, he has lost a resale at an advance of 1000*l.*, and, as he puts the compensation at 1000*l.*, it looks as if he had contracted to give the right price for the property as it stands. How then can I assume that the purchaser would not still give 3500*l.*? I must not make any bargain that might be unjust to either party. The proposed new bargain would be extremely hard on the vendor. She sells on the basis of income, and she has contracted to sell property producing 125*l.* a year for 3500*l.*, and, if the purchaser is right, she is to lose about one-third of the purchase-money. It would be a great hardship to enforce the contract against her with so large an abatement in respect of covenants which do not affect her enjoyment, and I cannot assume that she would have sold for such a reduced sum. The case really comes under the principle of *Earl of Durham* v. *Legard* (1), where the actual acreage was about half the acreage stated in the contract, and the purchaser was held not entitled to specific performance with a proportionate abatement of the price.

There is no case that contravenes the dictum of Jessel M.R. in *Cato* v. *Thompson.* (2) *Ramsden* v. *Hirst* (3) has no bearing, as there was an express provision for compensation, under which quite different considerations arise. *Powell* v. *Elliot* (4) was a vendors' suit for specific performance in which the pur-

(1) 34 Beav. 611.
(2) 9 Q. B. D. 616, 618.
(3) 4 Jur. (N.S.) 200.
(4) L. R. 10 Ch. 424.

chasers filed a cross-bill alleging, as I read it, innocent misrepresentation entitling them to rescission, and alternatively wilful misrepresentation entitling them to compensation by way of damages. It resembles the case of a man keeping an article purchased, and getting damages for misrepresentation. I do not think the other cases cited have much bearing. *Barnes* v. *Wood* (1) seems at first sight to go a long way in the plaintiff's favour, but it does not govern the present case. The true ground of the decision was explained in *Castle* v. *Wilkinson* (2), namely, that the vendor in *Barnes* v. *Wood* (1) proposed to convey the whole of the estate, as owner of the fee simple. This was a representation which he was liable to make good. There is no such representation here, and I dismiss the action with costs.

At the request of *Bramwell Davis, Q.C.*, the contract was rescinded.

Solicitors: *F. D. W. Hatton, for Walter Topham, Harrogate; Morgan, Price & Mewburn.*

(1) L. R. 8 Eq. 424.

(2) L. R. 5 Ch. 534, 537.

G. R. A.

Applied. Re A DEBTOR (No. 400 of 1940). [1949] 1 All E.R. 510.

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1900

Feb. 1, 2; *March* 27.

Applied. In re A DEBTOR. [1949] 1 Ch. 236

BIRD *v.* PHILPOTT.

[1898 B. 4971.]

Bankruptcy—After-acquired Property—Surplus Assets—Mortgage by Undischarged Bankrupt—Purchase of Real Estate—Contemporaneous Agreement for Charge—Successive Bankruptcies—Rights of Trustees—Vesting—Bankruptcy Act, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 40 *sub-s.* 5; *ss.* 44, 50, 54, 65, 168.

An undischarged bankrupt has power to dispose of any part of his assets that may remain after payment of his liabilities before that surplus is ascertained. The decisions in *In re Leadbitter*, (1878) 10 Ch. D. 388, and *Ex parte Sheffield, In re Austin*, (1879) 10 Ch. D. 434, merely shew that he cannot give an assignee a right to interfere in the administration of his bankruptcy.

A charge given by an undischarged bankrupt on specific property may be read as referring to such part of the property as turns out to be surplus.

Where an agreement for an advance to be made to an undischarged bankrupt in order to enable him to obtain a conveyance of real estate is contemporaneous with an agreement that the lender shall have a charge on the property so purchased, and the lender has no notice of the bankruptcy, the charge will be supported against the trustee.

Meux v. *Smith*, (1843) 11 Sim. 410, followed.

Where an undischarged bankrupt is made bankrupt a second time, and there is, by reason of the extent of his after-acquired property, a surplus in the first bankruptcy, the trustee in the second bankruptcy only takes that part of the surplus which has not been effectually dealt with by the bankrupt before the date of the second bankruptcy.

IN the year 1885 the defendant, Thomas Lovibond Templeman, was a plumber in Taunton, and on June 20, 1885, a receiving order was made against him in the county court. This was followed by adjudication, and the defendant Philpott was the trustee under this bankruptcy. Templeman never obtained his discharge, and a very small dividend had been paid to his creditors under that bankruptcy. In 1891 Templeman migrated to Slough, suppressed his name of Lovibond, got into employment there, and obtained credit without disclosing the fact that he was an undischarged bankrupt. The plaintiff was a solicitor at Uxbridge, and he was introduced to Templeman and procured advances for him and did work for him as a

solicitor. He also made advances to him, in respect of which the questions in this action arose. These advances were made in respect of three different sets of property, Nos. 1 to 4, Chard Villas, Nos. 5 and 6, Chard Villas, and, thirdly, three plots of building land adjoining the last-mentioned property. On May 16, 1898, Templeman bought these three plots at a sale by auction. The plaintiff at his request paid the deposit, 11*l.*, took up the contract and retained it, and paid 99*l.* 3*s.* 3*d.*, the balance of the purchase-money. By an indenture of June 17, 1898, Templeman, as beneficial owner, mortgaged by way of second charge the property first mentioned, 1 to 4, Chard Villas, by way of first charge the property 5 and 6, Chard Villas, and by way of first charge the three plots, which he had contracted to purchase, and which were about to be conveyed to him accordingly, to secure to the plaintiff a sum of 190*l.* 11*s.* 11*d.* and further advances. On July 6, 1898, the conveyance was executed of those three plots to Templeman, the plaintiff paying the balance of the purchase-money and receiving and retaining the conveyance, which was still in his hands. On September 30, 1898, Templeman was adjudicated a bankrupt at Windsor. The defendant Mercer was the trustee in that bankruptcy, and, acting as was alleged as agent for Philpott, took possession of all the property. The plaintiff claimed that there was due to him on the mortgage of June 17, 1898, 193*l.* 4*s.* 10*d.* for principal and interest, 144*l.* 0*s.* 3*d.* for further advances, 123*l.* 13*s.* for agreed costs, 305*l.* 7*s.* 2*d.* for other advances, and an additional sum for costs, and he claimed a declaration that he was entitled to a mortgage on the property comprised in the deed of June 17, 1898, for these sums, or some or one of them, and all other sums (if any) due to him for money advanced or paid on account of Templeman; a declaration that he was entitled to a lien or charge on the said property for the amount expended by him on the purchase and development of the property.

In the alternative he asked for a declaration that he was entitled on payment of the balance of the debts and costs provable under the first bankruptcy to have conveyed to him free from incumbrances the property mentioned in the indenture

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of June 17, 1898, as security for the amount of principal, interest and costs found to be due to him, and purporting to be secured by the said indenture.

It was admitted that Templeman's property, acquired after the first bankruptcy, was more than sufficient to pay off all his debts, interest and costs in that bankruptcy. The second trustee contended that the whole of this surplus was vested in him; and both trustees maintained that the mortgages and charges which the bankrupt had purported to create were invalid and ineffectual.

Herbert Reed, Q.C., and *E. W. Hansell,* for the plaintiff. The claim of the second trustee is idle, and the charge given to the plaintiff by the bankrupt is valid. Bankruptcy is a mode of execution, which satisfied, the surplus belongs to the bankrupt: Cooke's Bankrupt Laws, 8th ed. p. 16; and at the present day the debtor is entitled to the surplus, and can deal with it before he gets his discharge: Bankruptcy Act, 1883, ss. 20, 40, sub-s. 5; ss. 44, 50, sub-ss. 2 and 5; s. 54, sub-ss. 2 and 3; s. 65. The second trustee takes by a new title subject to mesne titles acquired against the debtor: *Meux* v. *Smith*. (1) It was so under the Judgments Act, 1838 (1 & 2 Vict. c. 110): *Cook* v. *Sturgis* (2); *Troup* v. *Ricardo* (3); and before that: *Ex parte Archer* (4); *Ex parte Malachy*. (5) So, again, voluntary conveyances were and are void only to the extent that might be necessary for the purpose of satisfying the debts and costs: *Ex parte Bell* (6); *Curtis* v. *Price* (7); *In re Sims, Ex parte Sheffield*. (8) The nature of the property was preserved: *Bromley* v. *Goodere* (9); *Banks* v. *Scott*. (10) A devise of real estate was not revoked by bankruptcy: *Charman* v. *Charman*. (11) A partner's share in the surplus of the joint estate was liable to the claims of his co-partners: *Ex parte King*. (12)

(1) 11 Sim. 410.
(2) (1859) 28 L. J. (Ch.) 345, 350, 351.
(3) (1864) 34 L. J. (Ch.) 91.
(4) (1826) 2 Glyn & J. 110.
(5) (1840) 1 M. D. & D. 353.
(6) (1822) 1 Glyn & J. 282.
(7) (1805) 12 Ves. 89, 103; 8 R. R. 303.
(8) (1896) 3 Manson, 340.
(9) (1743) 1 Atk. 75, 80.
(10) (1821) 5 Madd. 493.
(11) (1808) 14 Ves. 580.
(12) (1810) 17 Ves. 115; 11 R. R. 34.

There are three modern cases erroneously cited to shew that a bankrupt cannot give a charge on the surplus, namely, *In re Leadbitter* (1); *Ex parte Sheffield, In re Austin* (2); *Ex parte General Public Works and Assets Co.* (3) But they really only shew that the bankrupt's assignees cannot interfere with the trustee in the administration of the estate. The trustee takes subject to all equities: *Ex parte Beardmore* (4); *Ex parte Holthausen* (5); *Mitford* v. *Mitford.* (6) Secondly, the first trustee has no title against the plaintiff. The evidence shews that the advance of the money and the giving of the charge were simultaneous, as in *Meux* v. *Smith.* (7) Further, there was a contract with reference to a chose in action transferred to the plaintiff before the first trustee interfered: *Cohen* v. *Mitchell* (8), which decided that until the trustee intervenes bonâ fide transactions for value in respect of after-acquired property bind him. The doctrine applies to leaseholds: *In re Clayton and Barclay's Contract* (9); and to choses in action: *Hunt* v. *Fripp* (10); but not to general as distinguished from particular assignees: *Ex parte Beardmore.* (4) This was a chose in action transferred to the plaintiff before the trustee intervened. The doctrine is recognised in all subsequent cases, and applied to everything except a legal estate in land: *In re New Land Development Association and Gray* (11); but that is not an actual decision that the doctrine does not apply to real estate, and there is no reason why land should vest eo instanti more than a chose in action: *Herbert* v. *Sayer.* (12)

The Solicitor-General (*Sir R. B. Finlay, Q.C.*) and *Muir Mackenzie,* for the trustees in both bankruptcies. The trustee in the second bankruptcy is entitled to the surplus of the estate comprised in the first bankruptcy. The debtor has endeavoured to charge this property in favour of the plaintiff, but he had no power to do so. All his property, including after-acquired

(1) 10 Ch. D. 388.
(2) Ibid. 434.
(3) [1894] 2 Q. B. 302.
(4) Ibid. 393, 407.
(5) (1874) L. R. 9 Ch. 722.
(6) (1803) 9 Ves. 87.
(7) 11 Sim. 410.
(8) (1890) 25 Q. B. D. 262.
(9) [1895] 2 Ch. 212.
(10) [1898] 1 Ch. 675.
(11) [1892] 2 Ch. 138.
(12) (1844) 5 Q. B. 965.

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property and the right to complete this contract, was vested in the trustee of his first bankruptcy: Bankruptcy Act, 1883, ss. 20, 44, 54, 168. The bankrupt's right to surplus assets after payment of debts and costs is derived from s. 65, and is subject to the exercise by the trustee of the powers given to him by the previous sections. This question depends entirely on the Act of 1883. Decisions on the Judgments Act, 1838, as to insolvent debtors do not affect this point. Under that Act the surplus vested in the debtor by order, whereas under the Act of 1883 reconveyance is necessary. The whole previous legislation has been swept away by the Act of 1883: *Ex parte Reynolds.* (1) Therefore, an undischarged bankrupt cannot deal with the unascertained surplus so as to interfere with the trustee in his second bankruptcy, nor can he dispose of it by his will. He cannot give a mortgagee of surplus any right to an account from the trustee: *In re Leadbitter* (2); *Ex parte Sheffield, In re Austin.* (3) Even if the bankrupt had power to deal with the surplus assets he has not done so. The charge of June 17, 1898, refers to specific property only: it does not purport to assign or mortgage the surplus. It was a mortgage of specific property which was at that time vested in the first trustee: *Ex parte Rabbidge* (4); *In re Calcott and Elvin's Contract.* (5) In that case the property was not after-acquired, but that is immaterial: *In re New Land Development Association and Gray.* (6) As against the first trustee the plaintiff has no case. The charges on the first set of property, 1 to 4, Chard Villas, and on the three plots, were not contemporaneous with the advance, so they are not within *Meux* v. *Smith.* (7) On the second set of property, 5 and 6, Chard Villas, the bankrupt did not purport to give any charge to the plaintiff.

These transactions all refer to real estate, and it has been held that the doctrine of *Cohen* v. *Mitchell* (8) does not apply to real estate: *In re New Land Development Association and*

(1) (1885) 15 Q. B. D. 169, 186.
(2) 10 Ch. D. 388.
(3) Ibid. 434.
(4) (1878) 8 Ch. D. 367.
(5) [1898] 2 Ch. 460.
(6) [1892] 2 Ch. 138, 142.
(7) 11 Sim. 410.
(8) 25 Q. B. D. 262.

Gray. (1) The doctrine itself has been further limited by *Ex parte Beardmore*. (2)

Herbert Reed, Q.C., in reply. The difference in the manner in which surplus is revested in the bankrupt under the Acts of 1838 and 1883 is a mere question of machinery: *Wearing* v. *Ellis*. (3) The trustee is not prejudiced by a mortgage of the surplus: he would have to furnish an account before handing over the surplus. The mortgage of June 17, 1898, must be read as including all the bankrupt's estate, and it covers the surplus. If there had been no first bankruptcy the second trustee would have had no title to this property. It cannot be that the existence of the first bankruptcy gives the second trustee rights which he would not otherwise have had. This property never belonged to the bankrupt. He only acquired the legal estate subject to the plaintiff's charge.

March 27. FARWELL J. stated the facts, and continued:— The first question that has been argued relates to the title of the trustee in the second bankruptcy, and I will deal with that first.

Under the Bankruptcy Act, the trustee in a bankruptcy, whether it be the first, second, or any other, takes the bankrupt's property and nothing more. The bankrupt cannot give him anything that is not either his own or made by the Bankruptcy Act (e.g., under the order and disposition clause) his own for the purposes of the Act. To speak generally, the trustee claims through the bankrupt, and takes the bankrupt's property and not somebody else's property. Now, if I hold that all the after-acquired property, including the three properties in question in this action, belonged to the trustee in the first bankruptcy, there will be a surplus in respect of the first bankruptcy, and upon this it is contended that such surplus never belonged to the debtor in such a way that he could deal with it to the exclusion of the trustee in the second bankruptcy. I am not able to follow that argument. It appears to me that, in order to establish that proposition, the learned

(1) [1892] 2 Ch. 138. (2) [1894] 2 Q. B. 393, 404, 407.
(3) (1856) 26 L. J. (Ch.) 15.

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Solicitor-General would have had to support a proposition which he very candidly declined to do, and say that the bankrupt could not deal with his property at all, but was in fact civiliter mortuus.

It has been said that *Ex parte Sheffield, In re Austin* (1), and *In re Leadbitter* (2) decided that a bankrupt cannot deal with the possibility of surplus until all the debts in the first bankruptcy have been paid and the surplus has been ascertained. I do not think that these decisions decided anything to that effect at all. If they did, they would have overruled prior decisions—of the Lord Chancellor amongst others—which were not referred to and they would be, in my opinion, contrary to the whole spirit and principles on which the Bankruptcy Act is now built. As I read the Bankruptcy Act, the trustee takes all the bankrupt's property for an absolute estate in law, but for limited purposes, namely, for the payment of the creditors under that bankruptcy, and that bankruptcy only—payment of principal and interest, and all the costs of the bankruptcy. Subject to that, he is a trustee for the bankrupt of the surplus. He as a trustee is in a better position than an ordinary trustee to the extent pointed out in *Ex parte Sheffield, In re Austin* (1), and *In re Leadbitter* (2), that is to say, the bankrupt has not the ordinary right of a cestui que trust to intervene until the surplus has been ascertained to exist, and all the creditors and interest and costs have been paid. He cannot trouble the trustee by taxing the bill of costs or interfere with the administration of the estate in any way, but, subject to that and subject to his non-interference with the administration and with the management of the trustee during the bankruptcy in the due course of the execution of his duty, he can, in my opinion, demand the surplus, and he has a right to the surplus—a right which he can dispose of by will or deed or otherwise during the pendency of the first bankruptcy, even before the surplus is ascertained, although such disposition will of course be ineffectual unless in the event there prove to be a surplus upon which it can operate.

I will first refer to the cases in the *Law Journal* which were

(1) 10 Ch. D. 434. (2) 10 Ch. D. 388.

cited to me. They establish the general principle of the bankruptcy law in accordance with what I have just stated; and this is not in my opinion in any way altered by the Act of 1883. Lord Westbury in *Troup* v. *Ricardo* (1) says: "The duty of the Insolvent Debtors Court is discharged when the debts and claimants are all satisfied. There will then follow upon universal principle, the equity that the property remaining undistributed, being no longer required for any function of that Court, falls under the general rule of law, which raises, on the part of the legal owner of property no longer required for the purposes of the conveyance to him, a trust and obligation to restore that which is not wanted to the original owner, from whom it was taken for a limited purpose. It is clear, therefore, that the surplus of an insolvent's property is subject to that law of resulting trust."

I need not refer in any detail to *Cook* v. *Sturgis* (2); but the Solicitor-General distinguishes that case on the ground that the Act of Parliament there in question was phrased in different words. To my mind it really makes no difference. It appears to me that the older Act made two steps instead of the one step taken by the present Act. The present Act vests the right to the surplus direct in the bankrupt, subject to due distribution being made under the prior sections which have been referred to; but the older Act required a further vesting order. The authority which Mr. Reed cited in reply, *Wearing* v. *Ellis* (3), seems to me to dispose of the suggestion that that was anything more than mere machinery.

The Solicitor-General took a further point. He said that here the mortgage was a mortgage of a specific property, and that the bankrupt did not purport to deal with surplus. That appears to me to be really looking only at the shell and not at the substance. The bankrupt himself could not be heard to say, if it turned out in fact that there was this property, "I did not convey it as surplus, and all I could do was to convey surplus"; and in my opinion no one claiming through the bankrupt can be in any better position than the bankrupt himself.

(1) 34 L. J. (Ch.) 91, 94. (2) 28 L. J. (Ch.) 345.
(3) 26 L. J. (Ch.) 15.1

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To some extent it resembles the case of a cestui que trust, who is entitled to a share of the proceeds of sale of real property under a trust for sale. If that cestui que trust contracts to sell his share of the proceeds of sale in specie, and it turns out that the real estate has never been sold, I do not see how he could be heard to say that his interest had not passed, because at the time that he made the contract his only strict right was to share in a distribution of the proceeds of sale of the estate. Therefore, I hold that that objection also fails.

In my opinion the trustee in the second bankruptcy has no claim to any part of the surplus which the bankrupt has effectually dealt with. He can only take the property of the bankrupt at the time of the second receiving order. What that property is depends on what the bankrupt has done with it between the date of the first order and the date of the second order, and if and so far as the bankrupt has effectually dealt with it, then, in my judgment, it is not property of the bankrupt which can pass to the trustees in the second bankruptcy. [His Lordship then considered the plaintiff's claim to the first and second sets of property, and held on the facts that he had no charge on them unless under the indenture of June 17, 1898, and that they were vested in the trustee in the first bankruptcy, and continued:—]

The other three plots of land raise a different question—a question of some little nicety. As regards them, I find as a fact that the property was acquired by Mr. Bird's money entirely, both as regards deposit and as regards the balance, under an agreement by which he took up the contract and obtained a memorandum of charge, which corroborates the view that he was making the advance with the intention of taking the benefit of the conveyance when it was obtained, to the extent of his charge, and which is not displaced by the subsequent conveyance of July 6, 1898. To my mind the facts of the case—and I treat the charge of June 17, 1898, as part of the evidence for this purpose—are brought substantially within the decision of *Meux* v. *Smith*. (1) That case is somewhat

(1) 11 Sim. 410.

curious, but I think the grounds on which it was decided are put very plainly by the Lord Chancellor. (1) The Lord Chancellor suggests: "But whether this sort of case may not be made out, namely, that, previously to the contract being carried into effect between Gurney and the bankrupt, there was a contemporaneous contract, between the uncertificated bankrupt and Meux & Co., by which it was agreed that, although the uncertificated bankrupt was to take a lease in his own name, yet that the lease so taken in his name was, to the extent of the money advanced, to be for the benefit of Meux & Co. and Seager, Evans & Co." And that was the ground which the Vice-Chancellor, as reported on page 432, appears to have adopted. As I read the judgment, he seems to have found the fact rather from a consideration of the whole of the circumstances than from any express evidence of the existence of such an agreement. In my opinion, the case here presents less difficulty, because I find that there was an actual agreement, which was borne out by the charge taken in June before the conveyance was executed in July. I rest my judgment on *Meux* v. *Smith*. (2) I am unable to adopt Mr. Reed's ingenious suggestion that I could apply *Cohen* v. *Mitchell* (3), on the ground that the charge was on a chose in action actually transferred to the plaintiff before the trustee interfered. It appears that in *Cohen* v. *Mitchell* (3) the thing charged was a cause of action in respect of the right to property which had been wrongfully converted; but I cannot regard as a chose in action that which has in fact become real estate. Further, I am unable to adopt Mr. Reed's suggestion that I can disregard the case of *In re New Land Development Association and Gray* (4), which appears to have been rightly decided, but which, whether it was or not, I should not venture to do otherwise than follow.

I hold that the plaintiff is entitled to the extent of the money which he has paid to a charge on these last three plots.

[By the minutes of the order as finally settled the Court declared that the plaintiff was entitled to a first charge on the

(1) 11 Sim. 427.
(2) Ibid. 410.
(3) 25 Q. B. D. 262.
(4) [1892] 2 Ch. 138.

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third set of property comprised in the mortgage of June 17, 1898, for 110*l.* 3*s.* 3*d.*, and that, subject to the rights of the trustee in the first bankruptcy to the three sets of property, the plaintiff was, as against the trustee in the second bankruptcy, entitled to a mortgage on the three sets of property by virtue of the indenture of June 17, 1898, as security for the amount due to him for money advanced and costs incurred upon the security of these properties before the second bankruptcy; and the first trustee undertaking that, on the plaintiff paying to him in full the amount required to pay the balance of the bankrupt's liabilities under the first bankruptcy, and interest and costs, within twenty-one days from the receipt of notice of the amount required for this purpose, he would at the expense of the plaintiff convey to him the three properties for all the interest now vested in him (the first trustee), the Court made no further declaration as to the rights claimed by the plaintiff.]

Solicitors: *Church, Rendell, Todd & Co., for Bird, Son & Lovibond, Uxbridge; Solicitor to the Board of Trade.*

H. C. R.

DIXON *v.* KENNAWAY & CO.

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1900

April 4, 5.

[1899 D. 1043.]

Estoppel—Conduct—Company—Share Certificate—Duty of Director—Putting to Rest—Companies Act, 1862 (25 *&* 26 *Vict. c.* 89), *s.* 31.

The duty of examining and checking share certificates issued by a company may as a rule be properly left to the secretary. In that case a director is not estopped from denying the accuracy of a certificate passed at a board meeting at which he is present.

Whether the same rule applies to a director who signs the certificate, *quære.*

A certificate, though inaccurate, estops the company from denying its accuracy against any person relying on it, including (unless it is based on a forged transfer lodged by him) the person to whom it is issued, and that person, if put to rest by the certificate, so as to lose his remedy against his broker or transferor, is entitled to damages against the company.

The onus of proving that there is no present effective remedy against the broker or transferor lies on the person put to rest by the certificate; the onus of proving that there was no effective remedy at the date of the certificate lies on the company.

Knights v. *Wiffen*, (1870) L. R. 5 Q. B. 660, 665, and *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, followed and applied.

Simm v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, distinguished.

WITNESS ACTION.

This was an action against the above company and the chairman of the board of directors claiming a declaration that the plaintiff was entitled to thirty ordinary 10*l.* shares, numbered 115 to 144, and to dividends thereon accrued since December 31, 1893, or to damages.

The company was registered in 1892 with a capital of 100,000*l.*, divided into 5000 preference shares and 5000 ordinary shares of 10*l.* each, and shortly after registration 333 ordinary shares, numbered 1 to 333, were allotted to the chairman, who was one of the directors.

In January, 1897, the plaintiff purchased thirty ordinary shares through a broker named Liddell, who was also secretary of the company, for 324*l.* 18*s.*, which she paid to Liddell. She subsequently received, accepted, and returned to Liddell a

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transfer of thirty shares executed by Pitman, a clerk of Liddell, who did not hold thirty shares, and who was then and now a man of no substance. Pitman received no consideration for the transfer, which he merely executed by Liddell's direction. This transfer, which did not specify the denoting numbers of the shares, was placed before the board by Liddell at a board meeting on March 4, 1897, and the board, without requiring the production of Pitman's certificate, passed the transfer, and ordered it to be registered and a new certificate to be issued. At the same meeting a new certificate prepared by Liddell was issued under the seal of the company, signed by two directors and countersigned by the secretary in accordance with the articles, wherein it was certified that the plaintiff was the registered holder of thirty ordinary shares of 10*l.* each, numbered 115 to 144 inclusive. The chairman, who presided at the meeting, did not sign the certificate, and did not notice that the shares therein specified formed part of his own holding. The chairman and the board relied on the secretary to check transfers and certificates with the share register, and did not check them independently. On March 29, 1897, the plaintiff, having applied for the certificate, received Liddell's private cheque for the dividend to December 31, 1896, in respect of the shares, with a promise to send the certificate in about a month. On May 4, 1897, she received the certificate, and at the end of March, 1898, she received the usual dividend warrant for the year ending December 31, 1897. The chairman also received dividend warrants in respect of the same shares; but the duplication in the second case was not discovered, as the secretary paid a corresponding amount to the dividend account. On June 16, 1898, the board dismissed Liddell for gross irregularity and misconduct.

On March 29, 1899, the company gave the plaintiff written notice that Pitman's transfer was invalid, as he was not possessed of the shares, and requested the return of the certificate, and on April 24, 1899, they wrote finally declining to recognise her as a shareholder.

On June 12, 1899, the plaintiff commenced the present action. It appeared that Liddell became bankrupt on August 22, 1898,

and that nothing could now be recovered from him, but the defendants were unable to prove that he could not have reimbursed the plaintiff in May, 1897, if the company had refused to issue the certificate.

Badcock, Q.C., and *Ribton*, for the plaintiff. The certificate is primâ facie evidence of the plaintiff's title, and the onus is therefore on the defendants: Companies Act, 1862, s. 31.

[FARWELL J. assented.]

Bramwell Davis, Q.C., and *Kenyon Parker*, for the defendants. First. There is no cause of action against the chairman. He was entitled to assume the certificate was in proper order. It is not the duty of the chairman or directors to check each certificate. That duty is properly left to the secretary. Even if the chairman had signed the certificate, he would not have been liable unless his attention had been specially called to the denoting numbers. He owed no duty to the plaintiff, and is neither liable for negligence nor estopped from denying her title.

Secondly. There is no cause of action against the company. They owed no duty to the plaintiff, and are therefore not liable for negligence. The plaintiff, having obtained the certificate by lodging an ineffective transfer through the agency of her broker, cannot set it up by way of estoppel. Even if the company are estopped by the certificate, they cannot give the plaintiff the shares, and she can only get damages on proving that she has acted on the estoppel to her detriment, estoppel in itself giving rise to no cause of action: Buckley on Companies, 7th ed. p. 104; *Simm* v. *Anglo-American Telegraph Co.* (1); *Foster* v. *Tyne Pontoon and Dry Docks Co.* (2); and on this point it is immaterial whether the certificate is based on a forged transfer or on an ineffective transfer: *Bishop* v. *Balkis Consolidated Co.* (3)

In this case the plaintiff has not acted on the certificate, by selling or mortgaging the shares, or otherwise incurring liability in respect thereof. The damage arose when she originally paid for the shares, i.e., long before she received the certificate.

(1) 5 Q. B. D. 188. (2) (1893) 63 L. J. (Q.B.) 50.
(3) (1890) 25 Q. B. D. 512.

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Badcock, Q.C., and *Ribton*, for the plaintiff. First. The chairman is estopped by the certificate, which was authorized at a board meeting at which he presided. He cannot set up his own title against the plaintiff.

[FARWELL J. referred to *In re Kingston Cotton Mill Co. (No. 2)* (1) and *In re Denham & Co.* (2)]

Secondly. The plaintiff has a cause of action against the company, as she was put to rest by the certificate, and has lost her remedy against Liddell: *Knights* v. *Wiffen* (3); *Henderson & Co.* v. *Williams* (4); *Freeman* v. *Cooke* (5); *Carr* v. *London and North Western Ry. Co.* (6); *Bloomenthal* v. *Ford.* (7)

Balkis Consolidated Co. v. *Tomkinson* (8) shews that the company owed a duty to the plaintiff, as a prospective shareholder, to see that the transferor held the shares he purported to transfer.

Bramwell Davis, Q.C., in reply. The supposed doctrine of "putting to rest" is inconsistent with *Simm* v. *Anglo-American Telegraph Co.* (9) In any case the onus is on the plaintiff to shew that she could have recovered against Liddell in May, 1897, and that she cannot do so now. Lord Field's statement in *Balkis Consolidated Co.* v. *Tomkinson* (10), to the effect that a company owes a duty to a prospective shareholder sending in a transfer for registration, is only a dictum.

FARWELL J. In this case there are two points to be considered. The first relates to the plaintiff's rights against the chairman, the second to her rights against the company.

On the first point the plaintiff says that the chairman is liable to her, as he has acted in such a way that he cannot deny her title to the shares. The act relied on is that he presided at the board meeting that passed the plaintiff's certificate certifying that the plaintiff was the registered holder of shares 115 to 144.

(1) [1896] 2 Ch. 279.
(2) (1883) 25 Ch. D. 752.
(3) L. R. 5 Q. B. 660, 665.
(4) [1895] 1 Q. B. 521.
(5) (1848) 2 Ex. 654.
(6) (1875) L. R. 10 C. P. 307, 316.
(7) [1897] A. C. 156.
(8) [1893] A. C. 396.
(9) 5 Q. B. D. 188.
(10) [1893] A. C. 413.

According to the practice of the board, certificates were passed round at the meeting, and signed by two directors and countersigned by the secretary, and it is contended that the chairman is bound by the plaintiff's certificate.

This contention is unsound. It is not the duty of each director to inspect every certificate and compare it with the share register. That duty is as a rule properly left to a subordinate official. In this case it was left to the secretary, who was believed to be trustworthy, with the extra security that two of the directors signed the certificate. I express no opinion as to what the result would have been if the chairman had signed the certificate, but the mere fact that it was passed round the meeting is not sufficient to fix him with knowledge that the shares therein certified to belong to the plaintiff belonged in truth to another person, namely, himself. As against the chairman, therefore, the plaintiff fails.

The case against the company rests on a different footing, and raises a question of general interest. Sect. 31 of the Companies Act, 1862, makes the certificate primâ facie evidence of the plaintiff's title as against the company, and I therefore held that the onus lay on them to displace it. There is no doubt on the authorities that a certificate under the seal of the company estops the company from denying the title of a person who has accepted and acted on the certificate. In *Knights* v. *Wiffen* (1) Blackburn J. defines estoppel as follows: "Where one states a thing to another, with a view to the other altering his position, or knowing that, as a reasonable man, he will alter his position, then the person to whom the statement is made is entitled to hold the other bound, and the matter is regulated by the state of facts imported by the statement." I accept that as a good definition of estoppel, but add as corollaries the four propositions laid down by Brett and Denman JJ. in *Carr* v. *London and North Western Ry. Co.* (2), that is to say:—

"1. If a man by his words or conduct wilfully endeavours to cause another to believe in a certain state of things which the first knows to be false, and if the second believes in such state

(1) L. R. 5 Q. B. 660, 665. (2) L. R. 10 C. P. 307, 316.

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of things, and acts upon his belief, he who knowingly made the false statement is estopped from averring afterwards that such a state of things did not in fact exist.

"2. If a man, either in express terms or by conduct, makes a representation to another of the existence of a certain state of facts which he intends to be acted upon in a certain way, and it be acted upon in that way, in the belief of the existence of such a state of facts, to the damage of him who so believes and acts, the first is estopped from denying the existence of such a state of facts.

"3. If a man, whatever his real meaning may be, so conducts himself that a reasonable man would take his conduct to mean a certain representation of facts, and that it was a true representation, and that the latter was intended to act upon it in a particular way, and he with such belief does act in that way to his damage, the first is estopped from denying that the facts were as represented.

"4. If, in the transaction itself which is in dispute, one has led another into the belief of a certain state of facts by conduct of culpable negligence calculated to have that result, and such culpable negligence has been the proximate cause of leading and has led the other to act by mistake upon such belief, to his prejudice, the second (1) cannot be heard afterwards, as against the first (1), to shew that the state of facts referred to did not exist."

It is plain that when Blackburn J. uses the phrase "alter his position" he does not mean that an active alteration is necessary, but that it is sufficient if the person to whom the statement is made rests satisfied with the position taken up by him in reliance on the statement, so that he suffers loss.

In the present case it is plain that the plaintiff did not pay her money on the faith of the certificate. The certificate was not issued until after payment, so that no question of estoppel could arise on that payment. For the same reason, no estoppel could arise from the plaintiff's acceptance of the transfer. But the plaintiff on receiving the certificate was in a position either to retain or to part with the shares. If she had contracted to

(1) *Sic.*

sell them, she would have been entitled to damages for the loss sustained from her inability to deliver the shares in pursuance of a contract entered into on the faith of the certificate: *Balkis Consolidated Co.* v. *Tomkinson.* (1) In the present case she continued to hold the shares, and she has to prove that she has suffered loss by reason of such retention. She has proved that the position of her transferor and her broker are now such that she cannot recover against them. Her transferor, Pitman, was never a man of substance, so that he may be left out of consideration. But with regard to her broker, Liddell, the case is rather different. The plaintiff has shewn that she could not recover against Liddell at the date of the writ; for he was then bankrupt. But I have also to consider whether the plaintiff could have recovered against Liddell if she had sued him between the dates of the certificate and the bankruptcy; for, if he never could have paid at any time after the date of the certificate, no loss has arisen from the delay in suing him. On that point the proposition affirmed by *Knights* v. *Wiffen* (2), read by the light of *Foster* v. *Tyne Pontoon and Dry Docks Co.* (3), amounts to this. If the broker is insolvent at the date of the writ it lies on the defendant whose conduct has put the plaintiff to rest to shew that no money was ever recoverable against the broker, so that the plaintiff has not suffered damage by resting on the estoppel. Blackburn J. must have meant this in *Knights* v. *Wiffen.* (2) He says: "In the present case the money had been paid before the presentation of the delivery order; but I think, nevertheless, that the position of the plaintiff was altered through the defendant's conduct. The defendant knew that, when he assented to the delivery order, the plaintiff, as a reasonable man, would rest satisfied. If the plaintiff had been met by a refusal on the part of the defendant, he could have gone to Maris and have demanded back his money, very likely he might not have derived much benefit if he had done so; but he had a right to do it. The plaintiff did rest satisfied in the belief, as a reasonable man, that the property had been passed to him. If once

(1) [1893] A. C. 396. (2) L. R. 5 Q. B. 660, 665.
(3) 63 L. J. (Q.B.) 50.

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the fact is established, that the plaintiff's position is altered by relying on the statement and taking no steps further, the case becomes identical with *Woodley* v. *Coventry* (1) and *Hawes* v. *Watson*. (2) . . . . The plaintiff may well say, 'I abstained from active measures in consequence of your statement, and I am entitled to hold you precluded from denying that what you stated was true.'"

In *Foster* v. *Tyne Pontoon and Dry Docks Co.* (3) Collins J. says (4): "No doubt in *Knights* v. *Wiffen* (5) it was assumed that there was prejudice to the plaintiff, though no evidence appears to have been given at the trial as to the solvency of the plaintiff's vendor at the date of the representation; but I think that this must be treated as an inference of fact, and not of law." He evidently means that the onus of proving the contrary rests on the defendant. The defendants have not discharged this onus, or satisfied me that no good result would have accrued to the plaintiff, if the company had refused the certificate in May, 1897, and she had thereupon sued Liddell.

The company contend that I am bound by *Simm* v. *Anglo-American Telegraph Co.* (6), to which the present case is said to be similar, because Pitman had no shares corresponding to those denoted in the certificate. But that case was explained in *Balkis Consolidated Co.* v. *Tomkinson* (7), and differs toto cælo from the present case. *Simm's Case* (6) depended on two grounds. In the first place, there was estoppel against estoppel. The transferor forged the signature of a registered holder, and the transferee in good faith brought the transfer to the company and induced them to act on it. The fact of the forgery lay as much within the knowledge of the transferee as of the company. There is nothing of that sort in the present case. It is true that every member of the public can inspect the register on payment of a shilling. But it is not the practice for tranferees to inspect the register to see whether the transferor holds the shares he purports to transfer. The company

(1) (1863) 2 H. & C. 164.
(2) (1824) 2 B. & C. 540.
(3) 63 L. J. (Q.B.) 50.
(4) 63 L. J. (Q.B.) 55.
(5) L. R. 5 Q. B. 660, 665.
(6) 5 Q. B. D. 188.
(7) [1893] A. C. 396.

have it in their power to do this, and they owe a duty to an intending shareholder to see that his certificate does not contain shares belonging to some one else: *Balkis Consolidated Co.* v. *Tomkinson*. (1). This disposes of a suggestion made by Bramwell J. in *Simm's Case* (2), to the effect that companies are only bound to inquire into transfers for their own benefit, and not for the benefit of any one else. It appears to me that the Lords of Appeal in *Balkis Consolidated Co.* v. *Tomkinson* (3) all treat *Simm's Case* (4) as depending partly on the fact that the transferee was estopped from saying that the company were not entitled to act on the transfer. Lord Herschell says (5): "The grounds for the decision appear to have been two-fold: in the first place, that Burge had not altered his position by reason of the statement in the certificate; in the next place, that he had himself by producing to them a forged transfer induced the company to insert the name of his nominee as the proprietor of the stock."

The second point in *Simm's Case* (4) was that there was no evidence of damage, or of the insolvency of the broker or transferor. Brett L.J. (6) speaks of the remedy against the broker as still subsisting, and says (7): "But in any point of view *Knights* v. *Wiffen* (8) does not govern this case, even if the company did make a representation, and even if the doctrine as to putting another person to rest be true; for in the present case there is no evidence that Burge & Co. sustained damage by being put to rest." He means that there was nothing to shew that the persons receiving the certificate could not still recover the full value of the shares against the broker.

On the other hand, in *Balkis Consolidated Co.* v. *Tomkinson* (3) it was held that the original transferee was entitled to rely on the estoppel arising from the certificate. The damage there arose from a contract to sell to a third person. The plaintiff in such a case must shew that he has acted or rested on the estoppel to his detriment. In *Balkis*

(1) [1893] A. C. 396, 410, 413.
(2) 5 Q. B. D. 203.
(3) [1893] A. C. 396.
(4) 5 Q. B. D. 188.
(5) [1893] A. C. 406.
(6) 5 Q. B. D. 211.
(7) Ibid. 212.
(8) L. R. 5 Q. B. 660, 665.

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Consolidated Co. v. *Tomkinson* (1) the plaintiff had acted on the estoppel to his detriment. In the present case the plaintiff has rested on the estoppel to her detriment, i.e., she has remained satisfied with the certificate till the time at which she could have hoped to get redress from the broker is past and gone. The case is indistinguishable in principle from *Balkis Consolidated Co.* v. *Tomkinson.* (1)

Bishop v. *Balkis Consolidated Co.* (2) turned on the certification of a transfer; and *Bloomenthal* v. *Ford* (3) turned on a question of fact—namely, whether the allottee of shares had relied on the statement that they were fully paid. They do not afford any assistance in the present case.

Here there is a clear estoppel binding the company. They cannot, however, give the plaintiff the shares in question, as they belong to someone else, and they must, therefore, pay damages. I have not to consider any question as to the measure of damages, as it has been arranged that they are to be assessed at 324*l.* 18*s.*, with interest at 4 per cent. from December 31, 1897. The plaintiff will have judgment for that amount.

Solicitors: *Woodbridge & Sons; Holman, Birdwood & Co., for Roberts & Andrew, Exeter.*

(1) [1893] A. C. 396. (2) 25 Q. B. D. 512.
(3) [1897] A. C. 156.

G. R. A.

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1900. *Feb.* 8, 9, 10, 12, 15.

[1898 W. 4215.]

Patent—Utility.

A very small amount of utility is sufficient to support a patent. Utility, in patent law, does not mean abstract, or comparative, or competitive, or commercial utility; but, as applied to an invention, it means that the invention is better than the preceding knowledge of the trade as to a particular fabric, better that is in some respect though not necessarily in every respect. For instance, an invention is useful by which an article good, though not so good as one previously known, can be produced more cheaply by a different process. And an invention is useful when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before—or in other words, an invention is patentable which offers the public a useful choice.

Letters Patent 15,286 of 1885 (provisional specification dated December 12, 1885, and complete specification dated March 15, 1886), which were not the subject of the present action, were granted to Carl Auer von Welsbach, of Vienna, for an invention relating to "the manufacture of an illuminant appliance in the form of a cap or hood to be rendered incandescent by gas and other burners so as to enhance their illuminating power."

For this purpose, as stated in his complete specification, he employed "a compound of oxide of lanthanum and zirconium, or of these with oxide of yttrium, which substances, in a finally divided condition, when they are heated by a flame, give out a full, large, almost pure white light, without becoming volatilised or producing scale or ash, even after being kept incandescent for many hours, but remain efficient without deterioration even when they are long exposed to the air." And, after stating the proportions in which the above-mentioned substances were to be used, the complete specification proceeded as follows: "For applying the substances mentioned as

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an illuminant I use a fine fabric, preferably of cotton previously cleansed by washing with hydrochloric acid. I saturate this fabric with an aqueous solution of nitrate or acetate of the oxides, and gently press it until it does not readily yield fluid, so that, in stretching or opening out the fabric, the fluid does not fill up its meshes. The fabric is then exposed to ammonia gas, and, when it has been dried, it is cut into strips and folded into plaits." The complete specification concluded as follows: "What I claim is: The manufacture, substantially as herein described, of an illuminant appliance for gas and other burners, consisting of a cap or hood made of fabric impregnated with the substances mentioned and treated as set forth."

The letters patent sued on in the present action were 3592 of 1886, the application being made on March 13, 1886, and the complete specification being filed on March 15, 1886. The applicant was O. Imray, for an invention communicated from abroad by Welsbach. The complete specification commenced by stating that the specification of 1885 "described the manufacture of an illuminant appliance for burners, in the form of a cap or hood, made by impregnating fabric with solution of salts of certain rare metals, and then by the heat of the flame consuming the fabric so that the skeleton remains, consisting mostly of the oxides of the metals, which heated to incandescence, gives out a brilliant light," and that Welsbach, continuing his researches, had found that certain other substances could be advantageously employed in producing such illuminant appliances, and that an illuminant cap or hood producing when heated a white light could be produced by using (inter alia) (prescription 1) pure thorium oxide, which made a rigid hood; thorium oxide with other things, which made a flexible or very flexible hood. It was also pointed out that the combination of magnesia and alumina with thorium oxide was inconsistent with durability of the hoods. What was claimed was "in hoods prepared as illuminant appliances for burners, the use of oxide of thorium alone, or in admixture with oxides of zirconium, lanthanum, yttrium, neodymium, erbium, magnesium, or aluminium, substantially as herein described."

The present action was brought by the Welsbach Incandescent Gas Light Company, Limited, against the New Incandescent (Sunlight Patent) Gas Lighting Company, Limited, and five persons who were directors or officers of the defendant company, for an injunction to restrain the infringement of the patent 3592 of 1886 and consequent relief.

The defendants denied infringement, and pleaded amongst other things that the patent sued upon was not useful.

The action was tried by Buckley J. on February 8, 9, 10, and 12, 1900, and the only point on which the case is reported is as to the utility of the invention.

Moulton, Q.C., T. Terrell, Q.C., Roger Wallace, Q.C., and *A. J. Walter*, for the plaintiffs. Thorium, alone or with other substances, was suggested for the first time by the patent sued on. That substance gave, if used alone, a rigid, strong, tough mantle, although as an increase of illuminating power it was not so efficient as other rare earths. In the patent sense thorium was useful because it gave the opportunity of making with the addition of other substances a mantle which was not only rigid but a good illuminant, and also when other substances were added was flexible. This invention has nothing to do with the form of the mantle to be used, but only relates to the substances forming the mantle. The invention gives the public a useful choice.

Bousfield, Q.C., and *Neill*, for the defendants. There is no utility in the invention. The materials used do not produce a brilliancy equal to that which was produced by the materials referred to in the patent of 1885, and the new mixtures have no other good quality. The patentee says that mantles constructed according to his specification are either rigid or flexible. That is not in any way an advance, because everything must be either rigid or flexible.

[They referred to *Rushton* v. *Crawley* (1); *Thompson* v. *James* (2); *Reg.* v. *Cutler*. (3)]

Moulton, Q.C., in reply, referred to *Badische Anilin und*

(1) (1870) L. R. 10 Eq. 522. (2) (1863) 32 Beav. 570.
(3) (1849) 14 Q. B. 372, n.

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Soda Fabrik v. *Levinstein* (1); *Morgan* v. *Seaward* (2); *Lane-Fox* v. *Kensington and Knightsbridge Electric Lighting Co.* (3); *Philpott* v. *Hanbury.* (4)

Neill referred to *Edison & Swan United Electric Light Co.* v. *Holland.* (5)

Cur. adv. vult.

Feb. 15. BUCKLEY J. (after stating the claim made by the plaintiffs and the defences and answers to interrogatories). The defendants have admitted that they manufacture the mantles complained of, and I therefore proceed to consider the merits of the case.

Down to the year 1885, incandescent lighting, as then understood, was practically confined to throwing upon a solid body, such as a block of magnesium, an exceedingly hot flame, making use of the principle of the conversion of heat into light, in the form that if you can get a solid body which will stand the necessary temperature and expose it to a current of gas so as to raise it to a very high temperature, you get more light from the solid body at that temperature than from a gaseous body of the same temperature. The most familiar example of incandescent light as then practised may probably be said to have been the limelight.

In 1885 Welsbach took out a patent for an invention which was in fact the creation of the modern system of incandescent lighting. That patent really embraced two matters, and they were these: In the first place, the mode of forming the body which was to be rendered incandescent by the high temperature, and, secondly, the selection of the materials which were to be employed in the construction of that body. As regards the creation of the form of the body, his plan was to take a cotton fabric of a proper form, generally a cylindrical form, which might be either woven or knitted, to steep it in a solution of the soluble salts of what are called rare earths, such as zirconium, lanthanum and yttrium, and having steeped his

(1) (1887) 12 App. Cas. 710.
(2) (1835) 1 Web. P. C. 167, 176.
(3) [1892] 3 Ch. 424.
(4) (1885) 2 Rep. Pat. Cas. 33.
(5) (1889) 41 Ch. D. 28.

fabric in the solution, so that it was saturated, to dry and fire it, with the result that the heat destroyed totally the cotton fabric which formed the organic substance of the cap or hood or mantle according to its ordinary trade name, but left a coherent skeleton of resistent oxides in exactly the form of the cotton threads of which the fabric was originally made. By these means he obtained a body of excessive tenuity, and its fragility was in one sense its weakness—in that the body was liable to be destroyed by the impulse or energy of the flame in which it was bathed to render it incandescent—but in another sense its strength, in that its tenuity was such that it could bear excessive ranges of temperature without breaking. The other part of his invention consisted in the selection of the materials to be used in the preparation of the solution in which the cotton fabric was to be steeped. For this purpose he, in the patent of 1885, used zirconia, lanthana, and yttria; the oxides, that is, of zirconium, lanthanum and yttrium in certain proportions. [His Lordship referred to the specification of the first patent, and continued:—]

The claim in this patent was duplex. It claimed the manufacture as described of an illuminant appliance consisting of a hood made of a fabric impregnated with certain substances. The claim, therefore, was both for the form of the appliance and for the materials employed in constructing the appliance. The provisional specification of 1885 is dated December 12, 1885. The complete specification is dated March 15, 1886. Before, however, the complete specification of 1885 was filed, and at a date at which, therefore, the public had not been informed of the nature of that invention, Mr. Oliver Imray, under a communication from Herr Auer von Welsbach, on March 13, 1886, made application for a further patent, which is the patent upon which the present action is brought. Shortly stated, the patent of 1886 was for certain substances other than those mentioned in the patent of 1885, which could be advantageously employed in producing the illuminant appliances, the subject of the patent of 1885. It was impossible to introduce these further substances into the patent of 1885, because they were not included in the provisional specification. Application

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was, therefore, made on March 13, 1886, for the further patent, and two days later, namely, on March 15, 1886, the complete specification was filed in respect of the patent of 1885.

The claim in the patent for infringement of which the action is brought does not extend, as did the claim of 1885, to the manufacture of the form of the illuminant appliance as distinguished from the use of certain materials in its construction. It is a claim for the use of oxides of certain rare earths in hoods prepared as illuminant appliances. The patent of 1885 had described how to prepare the appliance in the sense of producing its form, and the patent of 1886 makes no claim to any new invention, or improvement of invention, in respect of that. The claim for the use of materials in the patent of 1886 is a claim restricted to the use of the materials in respect of hoods or mantles, but is not restricted to their use in respect of a hood or mantle formed in a particular way, and is substantially for the use of thorium oxide alone, or in admixture with the oxides of certain other rare earths as the means of obtaining hoods which have a particular character such as rigidity, flexibility, or durability. The claim is not to a process producing a hood whose advantage consists simply in brilliancy, but one which has another advantage combined with that, namely, the quality of rigidity, flexibility, or durability.

In 1886 thorium was a rare earth which had been for many years, I understand, known to chemists, but was of no known use to any human being. It had been analyzed, no doubt, and was to a large extent known; but pure thorium as of the date 1886 was a thorium which, with the knowledge of to-day, a chemist would call impure. From subsequent investigation and subsequent knowledge, chemists now know that what was regarded in 1886 as thorium was not thorium alone, but was thorium with an admixture of an exceedingly small quantity of cerium and certain other impurities. Knowledge of a date subsequent to 1886 has proved that while thorium oxide alone, if really pure, produces a mantle of low illuminating power, the addition of a very small percentage of cerium raises the illuminating power in a most remarkable degree. The fact is, as is now known, that thorium pure, as it was understood in the

year 1886, really contained a total impurity of about ·25 per cent., of which about one-fifth, or ·05 per cent., was cerium. It is now known that pure thorium, from which this impurity is removed, has a brilliancy of not more than 1·3 candles; and the defendants say that a mantle prepared according to prescription No. 1 of 1886, which would give, if the thorium were really pure, a light of only 1·3 candles, was not an improvement at all, but was a falling off from the patent of 1885. To this there seem to be two answers. The first is that the patent of 1886 does not claim to be an improvement on the patent of 1885, but to give a useful choice. The second is that if the matter had to be decided by the value of the mantle, as an illuminant appliance alone, the contention might be well founded but that there are advantages other than brilliancy, and the new discovery produces illuminating appliances which have other qualities, namely, rigidity, flexibility, or durability.

Now, subsequent discoveries have shewn that a thorium mantle, though inferior as an illuminating appliance, if pure thorium, as now understood, is employed, has this great advantage, that it is tougher or stronger in use than any other mantle which at present can be prepared. The flame which is used for supplying the required heat has a certain amount of impulse or energy, which has a tendency to destroy the very frail fabric of these mantles. To possess a mantle of sufficient strength is a matter of very great importance. Another point is this—that for maximum incandescence it is desirable that the mantle should remain bathed in the hottest part of the flame. Some mantles become deformed in use by contracting or falling out of shape when exposed to the excessively high temperature at which the results of incandescent lighting are obtained. The thorium mantle is of value, in that it is a mantle which becomes but little deformed in use—an advantage which is to be set against the disadvantage, that when pure thorium is employed the amount of the illumination is comparatively small. It is now, however, known, as I have said before, that if a very small percentage of cerium is added you obtain a double benefit —namely, that of the strength and stability of form of the thorium mantle, and also that of a high illuminating power, so

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that if 99 per cent. of thorium and 1 per cent. of cerium are employed, a light of from 18 to 20 candles is reached.

Now utility in patent law does not, as I understand it, mean either abstract utility, or comparative or competitive utility, or commercial utility. It was described by Grove J. in *Young* v. *Rosenthal* (1), as meaning an invention better than the preceding knowledge of the trade as to a particular fabric. I adopt this definition if the word "better" be understood as meaning better in some respects, and not necessarily better in every respect; so that, for instance, an article which is good, though not so good as that previously known, but which can be produced more cheaply by another process, is better in that it is better in point of cost, although not so good in point of quality. So here, I conceive that a mantle constructed according to prescription No. 1 of thorium, pure according to the knowledge of 1886, and which gave only 3 candles, or pure in fact, according to the knowledge of to-day, and which gives only 1·3 candles, although it is worse as an illuminating appliance than the mantle of 1885, which gave 4 or 4·5 candles, was nevertheless better, if it possessed in a greater degree the qualities of rigidity, durability, or stability. I may illustrate this by saying that, in point of fact, subsequent knowledge has shewn that it was useful, because, by the subsequent discovery that a small percentage of cerium will increase its luminosity, the step which was taken in 1886 has led to the possibility of making subsequently to 1893 a mantle which is not only durable and stable, but possesses also high illuminating power.

Again, I may take another test of utility, namely, that an invention is useful, for the purposes of the patent law, when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before, or, to express it in another way, that an invention is patentable which offers the public a useful choice. Now, the patent of 1886 offers the public an opportunity of making with thorium an appliance which, up to that date, it had been suggested could be made only with zirconium, lanthanum, or yttrium, and whether the thoria mantle gave a

(1) (1884) 1 Rep. Pat. Cas. 29, 34.

higher or lower illuminating light, it may well have been, as we now know that it was, useful to give the public the choice of using that rare earth instead of some of the rare earths mentioned in the specification of 1885. The amount of these rare earths which are to be found on the surface of the globe is, in respect of some of them, limited to but small quantities. Until the importance of thoria was known, I believe that it was supposed to exist only in extraordinarily small quantities, and it is only recently that, after explorations all over the world, there has been found at last a large bed of monosite sand which contains thorium. A very small amount of utility is sufficient to support a patent, and a suggestion to the public of this other rare earth as a means to an end gives, I think, utility to the patent for the purposes of the patent law.

Further, the question is not to my mind a question of improvement upon the patent of 1885. At the date when application was made for the patent of 1886 the public knew nothing of the patent of 1885, and the question is not whether the invention of 1886 was or was not an improvement upon that of 1885; the question is not whether the patent of 1886 enables the public to make an illuminating appliance better than that which they could make under the patent of 1885, but whether it gives to the public a useful choice of another substance to be used in making an illuminating appliance. The defence of non-utility, in my opinion, therefore fails.

[His Lordship then held that the patent of 1886 had been infringed, directed an inquiry as to damages, and ordered the delivery up and destruction of the infringing mantles.]

Solicitors for plaintiffs: *Faithfull & Owen.*
Solicitors for defendants: *Michael Abrahams, Sons & Co.*

F. E.

BUCKLEY J.

1900

March 6, 7, 8.

HONOUR *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES.

[1898 H. 3668.]

Insurance—Life—Repudiation of Assurer's Liability—Action for Declaration of Liability brought before Death of Assured.

P. insured his life with the defendants, and assigned the policy to the plaintiff. After two premiums had been paid the defendants refused to receive any further premium, and repudiated liability on the policy. Plaintiff brought an action in the lifetime of P., claiming a declaration that the policy was valid, and an injunction to restrain the defendants from repudiating it:—

Held, that, on the defendants undertaking that if an action was hereafter brought on the policy they would not rely as a defence on the non-payment of premiums on the due-days, the action would be dismissed.

THIS was an action brought in respect of a policy of insurance dated July 8, 1897, executed by the defendants in favour and on the life of H. H. Powis, and of which the plaintiff, Victor Honour, claimed to be the assignee. The assurance had been proposed on June 16 for 2000*l.*, and on July 2 the proposal had been increased to 4000*l.*, and a temporary policy was issued on July 2; but this was replaced by the assigned policy which was issued, namely, on July 8.

The plaintiff by his statement of claim asked for—(1.) a declaration that the policy assigned "was and is a valid and subsisting policy, and that the contracts thereunder on the part of the defendant society are valid and subsisting contracts, and that the plaintiff is entitled to the benefit of the said policy and contracts; (2.) an injunction restraining the defendant society, their servants and agents, from repudiating by words or acts the said policy of assurance, or any of the contracts thereunder."

The plaintiff further alleged that he had duly given the society notice of the assignment, and that two half-yearly premiums of 48*l.* 10*s.* had been paid to the society in respect of the policy. He also alleged that on July 16, 1898, he made a legal tender to the defendants of 48*l.* 10*s.*, being the premium

then payable in respect of the policy, and that the society refused "and refuses" to take it; and that the refusal by the society was a repudiation of the policy, and of their contracts under it. By their defence the defendants admitted that they did refuse to receive the premium payable in respect of the policy on July 16, 1898, and they denied that the policy was valid and subsisting.

The defence also alleged—(1.) that the policy was in fact effected by Honour in the name and on the pretended behalf of Powis, but for the use and benefit and on behalf of Honour, Powis acting as the plaintiff's agent and not on his own behalf; (2.) that the plaintiff had no interest in the life of Powis, and that the policy was therefore a gaming or wagering policy contrary to the statute 14 Geo. 3, c. 48, and void; (3.) that the policy did not contain the name of the plaintiff, and was unlawful under the statute; and (4.) that the policy was obtained by fraudulent misrepresentations and intentional concealment. And the defendants counter-claimed for a declaration that the policy was void, and ought to be delivered up to the society to be cancelled.

Cooper Willis, *Q.C.*, and *N. C. Home*, for the plaintiff, adduced evidence as to the circumstances under which the policy was effected, but did not call either the plaintiff or Powis as a witness.

Bray, *Q.C.*, and *Sheldon*, for the defendant society. The action is misconceived. The plaintiff cannot, while the assured is alive, obtain a declaration as to whether the policy is valid. The society is under no present liability to the plaintiff even if the policy is valid. The Court constantly refuses to make declarations as to interests and rights which can only arise in the future: *Bright* v. *Tyndall* (1); *Kevan* v. *Crawford*. (2) The defendants having repudiated liability, it is open to the plaintiff to bring an action for damages, but that is the only remedy at present available.

Cooper Willis, *Q.C.*, in reply. The plaintiff is not bound to wait until the death of Powis, the defendants having repudiated

(1) (1876) 4 Ch. D. 189. (2) (1877) 6 Ch. D. 29.

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all liability. Order xxv., r. 5, expressly provides that no action shall be open to objection on the ground that a merely declaratory judgment or order is sought. The defendants are not prejudiced by such an action, for they are entitled to plead, as they have in this case, that the policy was obtained by fraud.

[They also referred to *London Association of Shipowners and Brokers* v. *London and India Docks Joint Committee* (1); *British Equitable Insurance Co.* v. *Musgrave* (2); Bunyan on Life Assurance, 3rd ed. p. 119.]

BUCKLEY J. (after stating the effect of the plaintiff's claim). One ground of defence is that the policy, although effected nominally by Powis, who had an insurable interest in his own life, was in fact effected by Honour, who had not an insurable interest. The other ground of defence is that the life insured was not of the health mentioned in the proposal, and that a gross fraud was committed in the statement as to the nature of the life assured.

The plaintiff asks me to go into an investigation of those facts at the present time when, even if he is right in those facts, he is not entitled to recover anything from the defendant society at all. The contract between the parties is—that the policy-holder on paying from time to time certain semi-annual premiums shall, at a date not yet reached, namely, the date of the dropping the life, be entitled to receive 4000*l.* from the defendant company. At present the plaintiff has no claim against the defendants at all. The Court in many cases refuses to determine rights before the time has arrived at which the right is enforceable. One may see the good sense of that in the present case by making this observation: The defendant society, if they are sued when Powis' life drops, may be in possession of information which they have not now, and perhaps cannot get at present. They may shew at a future date that the policy was obtained by fraud. Why should they be called upon to do that now, when there is no enforceable claim in respect of the policy? The only point which struck me was this. The policy is in consideration of the payment of

(1) [1892] 3 Ch. 242. (2) (1887) 3 Times L. R. 630.

a premium, and the semi-annual payments of 48*l.* 10*s.* sterling are to be paid at the office of the society on or before June 16 in every year during the continuance of the life. The plaintiff, by reason of the refusal of the defendant society to take the money, has not been able to make the payment of premium due on June 16, 1898, and, as I understand, from what has been stated on the part of the defendants at the bar, if he comes at every subsequent December 16 and June 16 with his 48*l.* 10*s.* the society will refuse to receive it. Of course, the plaintiff must not be prejudiced in respect of that. When the policy drops he must not be prejudiced by the fact that he has not paid the premiums at the due dates. If that is provided for he has no right now to ask for a declaration in his favour that the policy is valid before any claim against the society has arisen. One right of action he would have now. He can bring his action for damages against the society for repudiation of a contract by refusing to receive the semi-annual premiums. He has not brought that action, and there is a reason for not doing so, that the damages would be nil, because the policy is worth nothing at all. He has brought an action for a declaration, and an injunction such as I have never heard of before. If the defendants will give an undertaking that in case any action shall be hereafter brought on the policy they will not rely on the non-payment on the due dates for payment of the premium due on June 16, 1898, or the subsequent premiums as being in itself a bar to the plaintiff's right to recover, it seems to me that I ought to refuse to deal with the action now, and I am prepared to dismiss it.

Bray, Q.C., said that, in lieu of asking for the dismissal of the action, he would withdraw all objection to the form of the action, and ask the Court to hear it on the merits if the plaintiff's counsel would put Honour in the witness-box.

THE COURT assented.

The plaintiff Honour was then called, but was not examined in chief. He was, however, questioned by the defendants'

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counsel, who called witnesses in support of the counter-claim. Powis and other witnesses were then called on behalf of the plaintiff.

BUCKLEY J. held that the policy was obtained by fraud and fraudulent misrepresentations, and declared the policy void, and ordered it to be delivered up to be cancelled.

Solicitor for plaintiff: *H. Rose-Innes.*

Solicitor for defendants: *John W. Sykes.*

F. E.

In re WELLBORNE.

KEKEWICH J.

1900

March 23.

[1900 W. 180.]

Costs—Taxation at Instance of Cestui que Trust—Bill paid by Trustees more than Twelve Months previously—Solicitors Act, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37–41.

Sect. 39 of the Solicitors Act, 1843, ought to be read and construed, as a separate and parenthetical enactment, independently of s. 41 of that Act; and, accordingly, taxation upon the application of a cestui que trust of a bill of costs paid by the trustees may be ordered under s. 39, notwithstanding that the application is not made within twelve calendar months after payment, as provided for by s. 41.

MOTION to discharge an order for taxation of costs made in chambers.

On January 16, 1900, Lilian Day Bowditch, who was a beneficiary under the will of her father and entitled to one moiety of his residuary estate, applied by summons in chambers for an order that three bills of costs for sums amounting to 100*l.* 2*s.*, 9*l.* 16*s.* 6*d.*, and 11*l.* 19*s.* 4*d.* respectively, which had been paid by the trustees of the will to their solicitors, Messrs. Wellborne & Son, might be referred for taxation.

The bill for 100*l.* 2*s.* was paid by the trustees on November 5, 1896, and the other two bills on May 8, 1899, and October 27, 1899, respectively.

Kekewich J. in chambers on March 5, 1900, having looked at the bills, and being of opinion that some of the items appeared to be extravagant, in the exercise of his discretion under s. 39 of the Solicitors Act, 1843, made an order referring the bills to taxation and reserving the consideration of the costs of taxation and of the application until after the taxing master should have made his certificate.

This motion was made to the Court on behalf of the solicitors for the discharge of the order for taxation.

Stallard, for the solicitors, in support of the motion. The bill for 100*l.* 2*s.* having been paid more than twelve months

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previously to the application for taxation, the Court is precluded by s. 41 of the Solicitors Act, 1843, from ordering the taxation of it.

[KEKEWICH J. intimated that if the order as to the bill for 100*l.* 2*s.* could not be supported he should not think fit to make any order in reference to the two smaller bills.]

In chambers the case of *In re Chowne* (1) was cited as an authority to shew that s. 41 of the Act has no application to s. 39, and the taxation thereunder at the instance of a cestui que trust of a bill of costs paid by trustees. (2) But the case

(1) (1884) 52 L. T. 75.

(2) The material sections of the Solicitors Act, 1843 (6 & 7 Vict. c. 73), are as follows :—

Sect. 38 : "Where any person, not the party chargeable with any such bill within the meaning of the provisions hereinbefore contained, shall be liable to pay or shall have paid such bill either to the attorney or solicitor, his executor, administrator, or assignee, or to the party chargeable with such bill as aforesaid, it shall be lawful for such person, his executor, administrator, or assignee, to make such application for a reference for the taxation and settlement of such bill as the party chargeable therewith might himself make, and the same reference and order shall be made thereupon, and the same course pursued in all respects, as if such application was made by the party so chargeable with such bill as aforesaid : Provided always, that in case such application is made when, under the provisions herein contained, a reference is not authorized to be made except under special circumstances, it shall be lawful for the Court or judge to whom such application shall be made to take into consideration any additional special circumstances applicable to the person making such application, although such circumstances might not be applicable to the party so chargeable with the said bill as aforesaid if he was the party making the application."

Sect. 39: "It shall be lawful in any case in which a trustee, executor, or administrator has become chargeable with any such bill as aforesaid, for the Lord High Chancellor or the Master of the Rolls, if in his discretion he shall think fit, upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill, to refer the same, and such attorney's or solicitor's, or executor's, administrator's, or assignee's demand thereupon, to be taxed and settled by the proper officer of the High Court of Chancery, with such directions and subject to such conditions as such judge shall think fit, and to make such order as such judge shall think fit for the payment of what may be found due, and of the costs of such reference, to or by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, by or to the party making such application, having regard to the provisions herein contained relative to applications for the like purpose by the party chargeable with such bill, so far as the same shall be applicable to such cases, and in

is not a decision upon that point, there being nothing in the report to shew that the bill had been paid for twelve months. The authorities on the subject are all the other way. They are collected in Cordery on Solicitors, 3rd ed. p. 328, where it is stated that it has frequently been held that no taxation can be ordered under s. 39 more than twelve months after payment. The case of *In re Downes* (1) is expressly in point. Lord Langdale there dealt with a case under s. 39, and said that the Court could not order taxation as against the solicitor if twelve months had elapsed after payment. All the other authorities, namely, *In re Massey* (2), *In re Neate* (3), *In re Boycott* (4), *In re Jackson* (5), and *In re Sutton and Elliott* (6), are consistent in treating s. 41 as a section of general application having reference to all the modes of taxation previously specified in ss. 37 to 40, and there is nothing in the language of s. 41 which will justify the Court in giving it a restricted interpretation.

Warrington, Q.C., and *O. L. Clare*, for the beneficiary, in support of the order. First, putting aside the authorities, we

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exercising such discretion as aforesaid the said judge may take into consideration the extent and nature of the interest of the party making the application: Provided always, that where any money shall be so directed to be paid by such attorney or solicitor, or the executor, administrator, or assignee of such attorney or solicitor, it shall be lawful for such judge, if he shall think fit, to order the same, or any part thereof, to be paid to such trustee, executor, or administrator so chargeable with such bill, instead of being paid to the party making such application; and when the party making such application shall pay any money to such attorney, or solicitor, or executor, administrator, or assignee of such attorney or solicitor, in respect of such bill, he shall have the same right to be paid by such trustee, executor, or administrator so chargeable with such bill as such attorney or solicitor, or executor, administrator, or assignee of such attorney or solicitor, had."

Sect. 41: "The payment of any such bill as aforesaid shall in no case preclude the Court or judge to whom application shall be made from referring such bill for taxation, if the special circumstances of the case shall in the opinion of such Court or judge appear to require the same, upon such terms and conditions and subject to such directions as to such Court or judge shall seem right, provided the application for such reference be made within twelve calendar months after payment."

(1) (1844) 5 Beav. 425.
(2) (1845) 8 Beav. 458.
(3) (1847) 10 Beav. 181.
(4) (1885) 29 Ch. D. 571.
(5) (1889) 40 Ch. D. 495.
(6) (1883) 11 Q. B. D. 377.

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submit that s. 41 does not apply to a case where a cestui que trust applies for taxation under s. 39. There is a marked contrast in language between s. 39 and the preceding sections, and in particular s. 38. Sect. 39 provides for a special and exceptional mode of taxation of a discretionary character. It empowers the Court in any case in which a trustee has become chargeable with a bill of costs, if the Court in its discretion shall think fit, upon the application of a party interested in the property out of which the trustee "may have paid or be entitled to pay" such bill, to refer the same to taxation. There is no limitation whatever as to the time when the bill has been paid, and it is obvious that, if there were any such limitation as is contained in s. 41, the necessary protection of the cestui que trust would be greatly impaired. Unless s. 39 is read, as it is submitted it ought to be, as a separate and parenthetical enactment, there is a direct inconsistency or discrepancy between s. 41 and s. 39. But if s. 41 is read as referring back to ss. 37 and 38, and not to the exceptional taxation provided for by ss. 39 and 40, the Act becomes intelligible and the inconsistency is removed.

Then as to the authorities. The only case except *In re Chowne* (1) in which s. 39 came under consideration was *In re Downes*. (2) The language of Lord Langdale in that case appears at first sight to be adverse to our contention, but when the case is more fully examined it will be seen that his attention was not called to the contrast between s. 39 and ss. 37, 38, and 41, which is the key to the true construction of the Act. None of the other cases cited against us were decisions under s. 39. *In re Massey* (3) was under s. 38. In *In re Neate* (4) and *In re Jackson* (5) s. 39 was not discussed. *In re Boycott* (6) and *In re Sutton and Elliott* (7), for anything that appears in the reports, may have been cases of ordinary taxation under s. 37. *In re Drake* (8) shews that s. 41, so far as it refers to special circumstances, has no reference to s. 39; and in *In re*

(1) 52 L. T. 75.
(2) 5 Beav. 425.
(3) 8 Beav. 458.
(4) 10 Beav. 181.
(5) 40 Ch. D. 495.
(6) 29 Ch. D. 571.
(7) 11 Q. B. D. 377.
(8) (1856) 22 Beav. 438.

Chowne (1) there is a direct expression of opinion to that effect, and if s. 41 is not applicable in that respect there can be no reason why it should be treated as applicable in respect to the lapse of twelve months.

Stallard, in reply.

KEKEWICH J. The importance of this case arises from the fact that the taxation is not between solicitor and client. It is not the case of a client coming to the Court for taxation after payment on the ground that the bill contains overcharges, or that for other special reasons it ought to be taxed. It is the case of a cestui que trust coming to tax a bill which the trustee has passed and paid, and the question is whether the cestui que trust ought to be charged with the full amount which the trustee has allowed to the solicitors, and it is obvious, therefore, that any question as to the power of the Court to order taxation in such a case is a matter of great importance and affects a large class. [His Lordship then made some observations to the effect that a solicitor for trustees would be well advised if he insisted on having his bill taxed from time to time, and, having noticed that that had not been done in this case, continued:—]

Sect. 39 of the Solicitors Act, 1843, provides expressly for taxation at the instance of a cestui que trust, and, on reading that section independently of s. 41, it is to be observed that there is a large discretion vested in the Court—large by virtue of the words of the Act, and also by virtue of the decision of the Court of Appeal in the case of *In re Chowne* (1)—as to whether the bill shall be sent to the taxing master or not. The Court is not merely to inquire whether there are gross overcharges amounting to fraud, but, looking at all the circumstances of the case, is to consider whether it is desirable to submit the bill to taxation, and words occur in that section which occur nowhere else in the Act, that it is to be done "upon the application of a party interested in the property out of which such trustee, executor, or administrator may have paid or be entitled to pay such bill." According to the section,

(1) 52 L. T. 75.

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standing alone, the fact of payment is no bar to the exercise of the discretion, and that, on the face of it, is right. The Legislature observed that trusts often last for a long period of time, and great injustice might be done if a solicitor by simply obtaining payment from his client, the trustee, could evade all liability to the cestui que trust out of whose fund the bill was paid, and who probably knew nothing about the matter, and perhaps at the time was only presumptively entitled, or under incapacity, and not in a position to call for an account. If that were so, solicitors might charge far too freely without any opportunity being allowed of cutting down their bills. It seems to me that the purport and intent of the section is that bills of costs which have been paid by trustees and executors shall be liable to taxation whenever the Court in the exercise of its discretion, and having regard to all the facts, thinks fit. That seems to me to obviate what would be a great evil, and to offer an inducement to the solicitors to trustees to get their bills taxed, which is very desirable both on their behalf and that of their clients.

Now the question is whether s. 39 is in any way interfered with by s. 41, and if s. 41 is a bar to the taxation of the bill for 100*l.* 2*s.*, I should not order taxation of the two smaller bills. The larger bill was paid more than twelve calendar months before the application for taxation was made, and therefore, if that section applies to that bill, it has gone beyond taxation. Does, then, s. 41 apply to such a case? I need not read the section at length. The purport of it is that it refers to the payment of "any such bill as aforesaid," and provides that the application for a reference to taxation shall be within twelve calendar months after payment. It has been decided more than once that "any such bill as aforesaid" is not confined to bills under s. 39 or any other previous section, but refers generally to the bills with which the Act deals, and particularly to those dealt with in s. 37. So far there is no difficulty. But then there is the provision that no taxation shall be directed if the bill has been paid twelve months previously. That appears to involve a contradiction of s. 39. Sect. 39 does not refer to payment within twelve months or

any other time, but uses the word "paid" without any limitation. There is not a suggestion in s. 39 that no order shall be made for taxation if the bill has been paid for twelve months, and the result is that s. 41, if it is to be connected with s. 39, must be read—most awkwardly as regards language and position—as being, in that particular, a proviso on s. 39. To my mind a very much easier and more correct way of reading the Act is to treat ss. 37 and 38 as being the essential and governing part of the Act, and then to read ss. 39 and 40 (which is in the nature of a corollary to s. 39) as being parenthetical, that is to say, as adding something to s. 37, and then when you come to s. 41 to go back to s. 37, and to read s. 41 as referring to any such bill as aforesaid as is taxable by virtue of ss. 37 and 38, and to the general rules as to taxation which are to be found in those sections, and not to the exceptional taxation which is provided for by s. 39. That seems to me the only way of reading the Act so as to make it an entire whole, because otherwise we must encounter the awkward fact that the proviso at the end of s. 41 is, if not in contradiction of, at all events inconsistent with the large discretion given by s. 39 to the Court whether the bill is paid or not. In other words, if s. 41 is to be construed as is contended on behalf of the solicitors it must be read as saying that no bill shall be referred to taxation at the instance of a cestui que trust if it has been paid more than twelve months. That is not the grammatical construction of the Act, or a construction which ought to be forced upon it, but there is some authority for it. Before turning to the decided cases I will refer to the book before me, which, though a modern work, and that of a living author, and therefore not entitled to the same respect as we pay, for instance, to the works of Lord St. Leonards, has been well known to the profession for many years and is an extremely valuable work. In Cordery on Solicitors, 3rd ed. p. 328, the learned author says this: "It has frequently been held that no taxation can be ordered under s. 39 more than twelve months after payment, which is a provision imported from s. 41; and the sounder view seems to be that special circumstances must be shewn even where the application is

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made within twelve months after payment." With all respect for a gentleman whose book has again and again been of great assistance to me, I cannot agree with the proposition that s. 41 can be imported into s. 39. That does not seem to me to be the reasonable construction of the Act. Then as to the authorities. Mr. Stallard relied very much on the case of *In re Downes* (1), and he was right in so doing. It is nearly sixty years old, being a decision, pronounced in 1844, of Lord Langdale who, besides being an eminent judge, is well known to have been particularly versed in these questions of taxation which in those days used particularly to come before the Rolls Court. Certainly the language of Lord Langdale points to the result for which Mr. Stallard contends. He says: "I think that in this Court the bill cannot be ordered to be taxed as against the solicitor himself, if twelve calendar months have elapsed after the payment." And then he points out that if a trustee or executor had paid a solicitor's bill improperly the cestui que trust can get behind it by means of proceedings for the disallowance by the Court on taxation of the whole or part of the payment so made. That seems to mean that you cannot tax the bill as against the solicitor himself. If that means really what it says with reference to ss. 39 and 41, it would be an authority which I should be bound to follow even against my own judgment. But when the case is looked at it will, I think, be found that the contrast between ss. 39 and 41 was not brought to the attention of the Master of the Rolls. He was deciding on the construction of s. 39, and so far his judgment is an authority; but he was not dealing with the contrast between s. 39 and the other provisions of the Act with which I am now dealing, and I cannot regard the case as an authority upon that. On the other hand, there is a decision of his successor, Lord Romilly, in *In re Drake* (2), which comes nearer to this point. He says (3): "By the 41st section the Court is precluded from ordering taxation after payment, except under 'special circumstances'; but that exception does not apply to cases under the 39th section . . . . in which no mention is

(1) 5 Beav. 425, 429.
(2) 22 Beav. 438.
(3) 22 Beav. 442.

made of 'special circumstances' "; and later on he says this (1): "I think that a taxation is almost a matter of course, assuming that items of overcharge are proved, and that it is not necessary that the overcharges should be such as to amount to fraud." It seems to me to be implied that in his opinion the limitation as to payment within twelve months had nothing to do with the case. But then there is a case of *In re Chowne* (2) which seems to point to the same conclusion. It is true that there the question was left open, because it was not necessary to decide it, but Fry L.J. expresses an opinion upon it. He says that the rule under s. 41 as to the necessity of shewing special circumstances does not apply to an application under s. 39, for s. 39 applies whether the executor "may have paid or be entitled to pay" the bill, and he says that in contrast to s. 41 in such a manner that I must conclude that he meant that the question of payment or non-payment was of no importance. There is one other case not precisely in point because not deciding the question arising here—the case of *In re Sutton and Elliott.* (3) There again Fry L.J. says this (4): "It appears to me that the words 'any such bill' in s. 41 refer back to that part of s. 37 where the subject of a bill of costs at all is first introduced, and that the expression 'any such bill' in s. 41 means 'any bill of such fees, charges and disbursements.' The result therefore is, if any such bill has been paid it cannot be opened except in the manner pointed out by that 41st section, and consequently the application to refer it to taxation must be made within twelve months after payment." That is to say, where the case comes within s. 37 the rule against taxation after the twelve months applies. That is throwing it back to s. 37. He does not decide the point which I have now to decide, but expresses the opinion that, on the construction of the Act, s. 41 is closely connected with s. 37. That assists me largely to the conclusion that the intervening sections, or some of them, are parenthetical. So far, therefore, as the authorities go, there is none against the

(1) 22 Beav. 443.
(2) 52 L. T. 75.
(3) 11 Q. B. D. 377.
(4) Ibid. 379.

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conclusion at which I have arrived except *In re Downes* (1), with which I have already dealt. Therefore, treating the point as a novel one, I must decide that s. 39 stands alone, and is not affected by s. 41. The result is that, in the exercise of my discretion, I ought to entertain this application for taxation, notwithstanding the payment which was made twelve months previously. The motion must be refused with costs.

Solicitors: *Wellborne & Son; Chester & Co.*

(1) 5 Beav. 425.

C. C. M. D.

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ACCOUNT—*Administration Action—Trust Deed—Misconduct of Trustee—Common Accounts refused at the Trial — Discretion of Court — Rules of Supreme Court*, 1883, *Order* lv., *r.* 10.

In 1887 A. conveyed his business and property to B. upon trusts for the benefit of his creditors with an ultimate trust for himself. Under the powers in the deed, B. carried on the business by means of an overdraft arranged with a bank. In 1893 A. assigned his interest under the deed to his wife, the plaintiff, for her separate use. In 1896 B. reconveyed the trust estate to the plaintiff, the reconveyance containing a recital that all A.'s debts had been paid. On this occasion some investigation of the trust account was made by the plaintiff, but a detailed account was not required. In July, 1898, B. destroyed all the books of account in the belief that they were no longer of use. In October, 1898, the plaintiff brought an action against B. charging him with fraud and misconduct, and claiming an account of all his transactions under the trust deed from 1887 to 1896 on the footing of wilful default. B. denied the charges, but admitted (1.) that he had improperly allowed the trust estate to be charged for a short period with interest at 5 per. cent. on sums amounting to 10,000*l.*; (2.) that he had received the usual commissions, amounting to 31*l.* 10*s.* 8*d.*, on fire insurances of the trust estate; and (3.) that he had retained 52*l.* 17*s.* 6*d.* for debts of A. due in 1887, but never claimed. At the trial the charges of fraud and wilful default were not established, but the plaintiff claimed an order for a common account from 1887:—

ACCOUNT—*continued.*

Held, that, although B. had been guilty of some misconduct, it was not a case in which the Court, in the exercise of its discretion under Order lv., r. 10, would under the circumstances make an order for a common account; but there would be judgment for the plaintiff for the amounts admitted under the three items above mentioned. Campbell *v.* Gillespie.
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A company incorporated by Act of Parliament, not only for the performance of duties of public utility, but also for the purpose of earning profits, is not entitled to the benefit of the Public Authorities Protection Act, 1893.

Dictum of Jeune P. in *The Ydun*, [1899] P. 236, 239, followed. Attorney-General *v.* Company of Proprietors of Margate Pier and Harbour - - - **Kekewich J. 749**

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ASSIGNS—Restrictive covenant — Tied public-house — Mortgagor and mortgagee — Underlessee—Notice - - 188
See COVENANT. 2.

ATTACHMENT—Committal or—Breach of undertaking—Service of order containing the undertaking—Solicitor - - 484
See PRACTICE. 6.

—— Married woman administratrix—Payment into court—Form of order - 180
See HUSBAND AND WIFE. 2.

AUCTION—Sale of lots—Solicitors' remuneration
See SOLICITOR. 2. 454

BAIL—*Illegal Contract—Bail to produce Prisoner—Indemnity.*

An indemnity given to bail, whether by the prisoner bailed or another, is illegal. CONSOLIDATED EXPLORATION AND FINANCE COMPANY *v.* MUSGRAVE - - - - North J. 37

BANKRUPTCY — *Proof — Company — Death of Shareholder — Insolvent Estate — Administration —Proof of Debts—Liability to Future Calls—Judicature Act*, 1875 (38 & 39 *Vict. c.* 77), *s.* 10—*Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *s.* 37, *sub-ss.* 3, 4, 6, 8.

By virtue of s. 10 of the Judicature Act, 1875, and s. 37 of the Bankruptcy Act, 1883, a company may prove, in the administration of the estate of a deceased shareholder whose estate is insolvent, for the estimated value of the liability to future calls in respect of the shares standing in his name. *In re* MCMAHON. FULLER *v.* MCMAHON - - - - Stirling J. 173

2. —— *Undischarged Bankrupt — After-acquired Property—Surplus Assets—Mortgage by Undischarged Bankrupt—Purchase of Real Estate —Contemporaneous Agreement for Charge—Successive Bankruptcies—Rights of Trustees—Vesting —Bankruptcy Act*, 1883 (46 & 47 *Vict. c.* 52), *ss.* 20, 40 *sub-s.* 5; *ss.* 44, 50, 54, 65, 168.

An undischarged bankrupt has power to dispose of any part of his assets that may remain after payment of his liabilities before that surplus is ascertained. The decisions in *In re Leadbitter*, (1878) 10 Ch. D. 388, and *Ex parte Sheffield*, *In re Austin*, (1879) 10 Ch. D. 434, merely shew that he cannot give an assignee a right to interfere in the administration of his bankruptcy.

A charge given by an undischarged bankrupt on specific property may be read as referring to such part of the property as turns out to be surplus.

Where an agreement for an advance to be

BANKRUPTCY—*continued.*
made to an undischarged bankrupt in order to enable him to obtain a conveyance of real estate is contemporaneous with an agreement that the lender shall have a charge on the property so purchased, and the lender has no notice of the bankruptcy, the charge will be supported against the trustee.

Meux v. *Smith*, (1843) 11 Sim. 410, followed.

Where an undischarged bankrupt is made bankrupt a second time, and there is, by reason of the extent of his after-acquired property, a surplus in the first bankruptcy, the trustee in the second bankruptcy only takes that part of the surplus which has not been effectually dealt with by the bankrupt before the date of the second bankruptcy. BIRD *v.* PHILPOTT
Farwell J. 822

—— Annuity—Appropriation of capital sum—Married woman—Restraint on anticipation - - - - - 162
See ANNUITY.

BERN CONVENTION, Art. 2—Fine arts—Infringement—Principal and agent—Penalties - - - - 73
See COPYRIGHT. 1.

BETTING—Streets—London County Council by-law—Validity - - - 10
See LONDON. 2.

BILL OF SALE—*Sale—Interest.*
Principal and interest secured by bill of sale were payable by equal monthly instalments. The borrower authorized the lender to sell, and out of the proceeds deduct the amount for which she was "liable":—

Held, that on sale interest ceased to run, and the lender was entitled to retain unpaid principal and interest to date only. WEST *v* DIPROSE
Cozens-Hardy J. 337

2. —— *Validity—Deviation from Statutory Form—"Stipulated Time of Payment"—Covenant to Pay "on or before" a Named Day—Bills of Sale Act*, 1882 (45 & 46 *Vict. c.* 43), *s.* 9.

By a bill of sale, given as security for money, the grantor agreed to pay the principal "on or before" November 1:—

Held, that this amounted to an agreement to pay on a fixed day, with a provision for the defeasance of the security (at the option of the grantor) on payment at an earlier date, and that the bill of sale was, therefore, "in accordance with" the form given in the schedule to the Bills of Sale Act, 1882, and was valid.

Decision of North J. reversed.

The provision in the statutory form that there must be a "stipulated" time of payment means that the time at which payment is to become obligatory upon the grantor must be fixed. DE BRAAM *v.* FORD - - - C. A. 142

BOUNDARY — Foreign State, status and boundaries of—Practice—Judicial cognizance—Application to Foreign Office
See EVIDENCE. 811

BREACH OF COVENANT—Forfeiture of lease—Notice bad in part - - 496
See LANDLORD AND TENANT. 4.

BREACH OF COVENANT—*continued.*
—— Quiet enjoyment—Breach by erection of buildings causing lessee's chimneys to smoke - - - - 642
See LANDLORD AND TENANT. 3.

BREACH OF UNDERTAKING—Committal or attachment—Service of order containing the undertaking—Solicitor - 484
See PRACTICE. 6.

BUILDING—Dangerous structures notice—Costs—Capital or income—Leasehold houses
See TENANT FOR LIFE AND REMAINDERMAN. 1. 326

BUILDING ESTATE—Restriction as to number of houses—"House"—Flat - 412
See COVENANT. 1.

BUSINESS—Trustee carrying on—Tort—Damages against trustee—Right to indemnity—Subrogation - - - 199
See TRUSTEE.

BY-LAW—Validity—Betting—Streets—London County Council - - - 10
See LONDON. 2.

CALLS—Death of shareholder—Insolvent estate—Proof of debts—Liability to future calls - - - - - 173
See BANKRUPTCY. 1.

—— Lien of company on unpaid shares—Alteration of articles of association - 656
See COMPANY. 1.

CAPITAL—Income or—Leasehold houses—Costs 319, 326
See TENANT FOR LIFE AND REMAINDERMAN. 1, 2.

CAPITAL MONEY—Improvements—Prospective order—Tenant for life - 461
See SETTLED LAND. 1.

CASES—*Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361, considered - - - 656
See COMPANY. 1.

—— *Attorney-General* v. *Teddington Urban Council*, [1898] 1 Ch. 66, followed 51
See LOCAL GOVERNMENT. 1.

—— *Bulkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, followed and applied - 833
See COMPANY. 9.

—— *Banks* v. *Gibson*, (1865) 34 Beav. 566, explained - - - - 551
See PARTNERSHIP.

—— *Batty* v. *Hill*, (1863) 1 H. & M. 264, followed - - - - - 1
See FALSE REPRESENTATION.

—— *Beal, Ex parte*, (1868) L. R. 3 Q. B. 387, followed - - - - 73
See COPYRIGHT.

—— *Benett* v. *Wyndham*, (1862) 4 D. F. & J. 259, followed - - - - 199
See TRUSTEE.

—— *Biggs* v. *Hoddinott*, [1898] 2 Ch. 307, distinguished - - - - 213
See MORTGAGE. 1.

—— *Brett* v. *Rogers*, [1897] 1 Q. B. 525, approved.
See LANDLORD AND TENANT. 2. 128

CASES—*continued.*

—— *Brown, In re*, [1895] 2 Ch. 666, followed 80
See LUNACY. 2.

—— *Burnett* v. *Berry*, [1896] 1 Q. B. 641, approved - - - - 10
See LONDON. 2.

—— *Burney* v. *Macdonald*, (1845) 15 Sim. 6, referred to - - - - 237
See WILL. 1.

—— *Calder and Hebble Navigation Co.* v. *Pilling*, (1845) 14 M. & W. 76, distinguished 10
See LONDON. 2.

—— *Castle* v. *Wilkinson*, (1870) L. R. 5 Ch. 534, 537, applicable - - - 815
See VENDOR AND PURCHASER. 2.

—— *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616, referred to - - - - 616
See VENDOR AND PURCHASER. 2.

—— ———— Dictum in, at p. 618, approved and followed - - 815
See VENDOR AND PURCHASER. 4.

—— *Conlan's Estate, In re*, (1892) 29 L. R. Ir. 199, discussed - - - 774
See MORTGAGE. 2.

—— *Croome* v. *Croome*, [1888] W. N. 37, 152; [1889] W. N. 156; 59 L. T. 582; 61 L. T. 814, applicable - - 84
See WILL. 9.

—— *Darcy (Lord)* v. *Askwith*, (1617) Hob. 234, applicable - - - - 624
See WASTE.

—— *Davies* v. *Fitton*, (1842) 2 D. & War. 225, referred to - - - - 616
See VENDOR AND PURCHASER. 4.

—— *Deeley* v. *Perkes*, [1896] A. C. 496, 500; 13 Rep. Pat. Cas. 581, explained - 508
See PATENT. 2.

—— *De Linden, In re*, [1897] 1 Ch. 453, followed - - - - 80
See LUNACY. 2.

—— *Delmer* v. *M'Cabe*, (1863) 14 Ir. C. L. Rep. 377, explained - - - 616
See VENDOR AND PURCHASER. 4.

—— *D'Eyncourt* v. *Gregory*, (1875) 1 Ch. D. 441, distinguished - - - 96
See WILL. 8.

—— *D'Huart* v. *Harkness*, (1865) 34 Beav. 324, followed and approved - - 442
See POWER. 3.

—— *Didisheim* v. *London and Westminster Bank*, [1899] W. N. 107; 43 Sol. J. 642; 81 L. T. 108, distinguished - - 80
See LUNACY. 2.

—— *Ebsworth and Tidy's Contract, In re*, (1889) 42 Ch. D. 23, considered - - 287
See VENDOR AND PURCHASER. 1.

—— *Ellis* v. *Marshall & Son*, (1895) 64 L. J. (Q.B.) 757, followed - - 73
See COPYRIGHT. 1.

—— *Finney* v. *Hinde*, (1879) 4 Q. B. D. 102, commented on - - - 386
See PRACTICE. 1.

—— *Fitz* v. *Iles*, [1893] 1 Ch. 77, commented on
See LANDLORD AND TENANT. 1. 66

CASES—*continued.*

—— *Foster* v. *Foster*, (1875) 1 Ch. D. 588, approved of - - - - 101
See PARTITION.

—— *Franks* v. *Weaver*, (1847) 10 Beav. 297; 8 L. T. (O.S.) 510, explained and distinguished - - - - 1
See FALSE REPRESENTATION.

—— *Garrard* v. *Frankel*, (1862) 30 Beav. 445, commented on - - - 616
See VENDOR AND PURCHASER. 4.

—— *Gibson* v. *Doeg*, (1857) 2 H. & N. 615, followed - - - - 108
See VENDOR AND PURCHASER. 5.

—— *Gray* v. *Smith*, (1889) 43 Ch. D. 208, distinguished - - - - 551
See PARTNERSHIP.

—— *Haly* v. *Barry*, (1868) L. R. 3 Ch. 452, commented on - - - - 386
See PRACTICE. 1.

—— *Hancock, In re*, [1896] 2 Ch. 173, applicable - - - - - 807
See POWER. 4.

—— *Harris* v. *Pepperell*, (1867) L. R. 5 Eq. 1, commented on - - - 616
See VENDOR AND PURCHASER. 4.

—— *Harty* v. *Davis*, (1850) 13 Ir. L. Rep. 23, approved - - - - 774
See MORTGAGE. 2.

—— *Horsey Estate, Limited* v. *Steiger*, [1899] 2 Q. B. 79, distinguished - - 496
See LANDLORD AND TENANT. 4.

—— *Howard* v. *Jalland*, [1891] W. N. 210, approved of - - - - 101
See PARTITION.

—— *Hummel* v. *Hummel*, [1898] 1 Ch. 642, distinguished - - - - 442
See POWER. 3.

—— *Imperial Mercantile Credit Association* v. *Coleman*, (1871) L. R. 6 Ch. 558 (which has not been overruled on this point by S. C. (1873) L. R. 6 H. L. 189), followed - - - - 756
See COMPANY. 5.

—— *James* v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, considered
See COMPANY. 1. 656

—— *Jarvis & Co., In re*, [1899] 1 Ch. 193, distinguished - - - - 804
See COMPANY. 7.

—— *Jones* v. *Badley*, (1868) L. R. 3 Ch. 362, referred to - - - - 237
See WILL. 1.

—— *Kemp* v. *Bird*, (1877) 5 Ch. D. 549, 974, followed - - - - 66
See LANDLORD AND TENANT. 1.

—— *King* v. *Denison*, (1813) 1 V. & B. 260; 12 R. R. 227, discussed - - 84
See WILL. 9.

—— *Kirwan's Trusts, In re*, (1883) 25 Ch. D. 373, distinguished - - - 442
See POWER. 3.

—— *Knights* v. *Wiffen*, (1870) L. R. 5 Q. B. 660, 665, followed and applied - - 833
See COMPANY. 9.

CASES—*continued.*

—— *Leadbitter, In re*, (1878) 10 Ch. D. 388, explained - - - - 822
See BANKRUPTCY. 2.

—— *Liverpool Adelphi Loan Association* v. *Fairhurst*, (1854) 9 Ex. 422, discussed 203
See HUSBAND AND WIFE. 3.

—— *Liverpool Marine Credit Co.* v. *Hunter*, (1867) L. R. 4 Eq. 62; (1868) L. R. 3 Ch. 479, followed - - - 602
See COMPANY. 4.

—— *Lucas* v. *James*, (1849) 7 Hare, 410, distinguished - - - - 257
See VENDOR AND PURCHASER. 8.

—— *Metropolitan Board of Works* v. *London and North Western Ry. Co.*, (1880) 14 Ch. D. 521; (1881) 17 Ch. D. 246, approved
See LONDON. 695

—— *Meux* v. *Smith*, (1843) 11 Sim. 410, followed
See BANKRUPTCY. 2. 822

—— *Millard's Settled Estates, In re*, [1893] 3 Ch. 116, distinguished - - - 461
See SETTLED LAND. 1.

—— *Mortlock* v. *Buller*, (1804) 10 Ves. 292, 315; 7 R. R. 417, applicable - - 815
See VENDOR AND PURCHASER. 2.

—— *Moss* v. *Cooper*, (1861) 1 J. & H. 352, referred to - - - - 237
See WILL. 1.

—— *Moule* v. *Garrett*, (1872) L. R. 7 Ex. 101, discussed - - - - 296
See JUDGMENT.

—— *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11, referred to - - - - 616
See VENDOR AND PURCHASER. 4.

—— *Paget* v. *Marshall*, (1884) 28 Ch. D. 255, commented on - - - 616
See VENDOR AND PURCHASER. 4.

—— *Peebles* v. *Oswaldtwistle Urban Council*, [1897] 1 Q. B. 384, followed on one point - - - - - 781
See LOCAL GOVERNMENT. 3.

—— *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, (1899) 16 Rep. Pat. Cas. 209, principles in, applied - 577
See PATENT. 1.

—— *Price* v. *Griffith*, (1851) 1 D. M. & G. 80, explained - - - - 341
See MINES.

—— *Queen's College, Oxford* v. *Hallett*, (1811) 14 East, 489; 13 R. R. 293, observed upon - - - - - 624
See WASTE.

—— *Roach* v. *Wadham*, (1805) 6 East, 289, followed - - - - 188
See COVENANT.

—— *Russell* v. *Jackson*, (1852) 10 Hare, 204, referred to - - - - 237
See WILL. 1.

—— *Santley* v. *Wilde*, [1899] 2 Ch. 474, distinguished - - - - 213
See MORTGAGE. 1.

—— *Scott* v. *Morley*, (1887) 20 Q. B. D. 120, explained and distinguished - - 180
See HUSBAND AND WIFE. 2.

CASES—*continued.*

—— *Serle, In re*, [1898] 1 Ch. 652, distinguished
See LANDLORD AND TENANT. 4. 496

—— *Sheffield, Ex parte. In re Austin*, (1879) 10 Ch. D. 434, explained - - 822
See BANKRUPTCY. 2.

—— *Simm* v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, distinguished
See COMPANY. 9. 833

—— *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, applicable - - - - 43
See PRINCIPAL AND AGENT.

—— *Stevenson, Ex parte*, (1867) 16 W. R. 95, distinguished - - - 365
See COMPANY. 10.

—— *Strickland* v. *Hayes*, [1896] 1 Q. B. 290, distinguished - - - 10
See LONDON. 2.

—— *Tubbs* v. *Wynne*, [1897] 1 Q. B. 74, referred to - - - - - 231
See VENDOR AND PURCHASER. 3.

—— *Wallace* v. *Greenwood*, (1880) 16 Ch. D. 362, referred to - - - - 101
See PARTITION.

—— *Webber, In re*, [1896] 1 Ch. 914, disapproved - - - - 565
See REVENUE. 1.

—— *White* v. *Morley*, [1899] 2 Q. B. 34, approved - - - - 10
See LONDON. 2.

—— *Whiteley Exerciser, Limited* v. *Gamage*, [1898] 2 Ch. 405, distinguished - 43
See PRINCIPAL AND AGENT.

—— *Williams* v. *Roberts*, (1857) 27 L. J. (Ch.) 177; 4 Jur. (N.S.) 18, applicable 84
See WILL. 9.

—— *Wilson* v. *Thornbury*, (1875) L. R. 10 Ch. 239, 249, not followed in one respect
See VOLUNTARY GIFT. 354

—— *Wright* v. *Leonard*, (1861) 11 C. B. (N.S.) 258, followed - - - 203
See HUSBAND AND WIFE. 3.

—— *Ydun, The*, [1899] P. 236, 239, followed
See ACTION. 749

CHANCERY COURT OF LANCASTER—Costs—Taxation - - - - 573
See LANCASTER COURT.

CHARGING ORDER—Death of judgment debtor—Leave to issue execution against executor - - - - - 386
See PRACTICE. 1.

—— Funds in court—Lunatic—Administration
See LUNACY. 4. 489

CHARITY—*Highway—Repair of Road—Road transferred to Local Authority—Failure of Trust.*

The testator bequeathed 3000*l.* upon trust to build galleries in a church and to construct a causeway, and directed that 40*l.* a year should be laid aside for the repairs of the galleries and the road as there should be occasion, and as the trustees should think fit, and gave the residue after these things were performed to other objects. An additional sum of 40*l.* a year out of the funds was subsequently ordered by the Court of Chancery to be applied to the repairs of the road.

CHARITY—*continued.*
The road had recently come under the control of a county council and a district council, so that the obligation to repair it rested on these bodies:—
Held, that this circumstance did not put an end to the trust, and that so much of the 80*l.* a year as was available for the repairs of the road ought to be paid to the councils. ATTORNEY-GENERAL *v.* DAY - - - North J. 31

CHILDREN—"Die without child or children"—Executory gift over - - 768
See WILL. 3.

—— "Eldest son"—Entitled to possession—Construction of will - - - 795
See WILL. 4.

—— "Issue"—Construction of will - 417
See WILL. 6.

CHIMNEY—Covenant for quiet enjoyment—Breach by erection of buildings causing lessee's chimneys to smoke - 642
See LANDLORD AND TENANT. 3.

CLOG—On redemption—"Tied" public-house
See MORTGAGE. 1. 213

COMMITTAL—Attachment or—Breach of Undertaking—Service of order containing the undertaking—Solicitor - - 484
See PRACTICE. 6.

COMPANY—*Articles of Association—Shareholder—Vendor's Shares—Fully Paid Shares—Unpaid Shares—Calls—Arrears—Debts—Lien of Company on Unpaid Shares—Alteration of Articles—Special Resolution—Lien on Fully Paid Shares for Arrears of Calls on Unpaid Shares—Contract—Restrospective Effect of Altered Articles—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 50—*General Meetings—Notice—Service—"Member"—Deceased Member—Legal Personal Representatives.*
A limited company by one of its articles provided that it should have a lien for all debts and liabilities of any member to the company, "upon all shares (not being fully paid) held by such member."
The company, by way of purchase-money for the property acquired by it, allotted fully paid shares to Z., a nominee of the vendor to the company. Z. also applied for and had allotted to him shares not paid up. He was the only holder of fully paid-up shares. At his death he was indebted to the company in arrears of calls on the unpaid shares, but his assets were insufficient to pay the arrears. Thereupon the company, by special resolution under s. 50 of the Companies Act, 1862, altered the above article by omitting therefrom the words "not being fully paid," thus creating a lien on Z.'s fully paid shares:—
Held, by the Court of Appeal (Lindley M.R., Vaughan Williams and Romer L.JJ.), that the company had power to alter its articles by extending its lien to fully paid shares:
Held, also, by Lindley M.R. and Romer L.J. (Vaughan Williams L.J. dissenting), that the lien so extended, having been made in good faith, was enforceable against Z.'s fully paid shares, since he took them subject to the original articles and the power of altering them given to the company by s. 50 of the Act, and did not make any special or implied bargain that they should not be affected by any subsequent alteration of the articles; and that the fact of those shares being vendor's shares allotted in payment for the property purchased by the company, instead of being shares paid for in cash in the ordinary way, was immaterial.
James v. *Buena Ventura Nitrate Grounds Syndicate*, [1896] 1 Ch. 456, and *Andrews* v. *Gas Meter Co.*, [1897] 1 Ch. 361, considered as to the "retrospective" effect of an alteration by a company of its articles.
Where, under a company's articles, notice of general meetings is to be given to "members," and such notice may be served upon any "member" either personally or by sending it prepaid by post addressed to "such member" at his registered address, it is not necessary, in the case of a deceased member, either to send a notice addressed to him at his registered address, or to serve his legal personal representatives unless they have themselves become "members" by formal registration.
Judgment of Kekewich J., [1899] 2 Ch. 40, varied. ALLEN *v.* GOLD REEFS OF WEST AFRICA, LIMITED. SAME *v.* SAME - - C. A. 656

2. —— *Articles of Association—Ultra Vires—Reconstruction—Voluntary Winding-up—Sale of Assets to New Company—Shares in purchasing Company—Rights of Dissentient Members—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161.
A company cannot, by its articles of association, deprive members of the protection afforded to them by s. 161 of the Companies Act, 1862, in the event of their dissenting from a sale of the company's assets in a winding-up in consideration of shares in a new company.
A company by its articles gave the liquidator, in the case of a voluntary winding-up, power (irrespective of the powers conferred upon him by the Companies Acts, and as an additional power), with the authority of a special resolution, to sell the undertaking and assets of the company for shares fully or partly paid up, or the obligations of or other interest in any other company, and to make an agreement for the allotment to the shareholders direct of the proceeds of sale in proportion to their respective interests in the company. The articles further provided that upon any sale thereunder, or under s. 161 of the Companies Act, 1862, no member should be entitled to require the liquidator either to abstain from carrying into effect the sale or the resolution authorizing the same, or to purchase his interest in the company; but that the liquidator might, upon the request in writing of a dissentient member, sell his shares or interest and pay over to him the net proceeds thereof:—
Held, that the articles were ultra vires and inoperative so far as they purported to deprive dissentient shareholders of the rights conferred upon them by s. 161. PAYNE *v.* CORK COMPANY Stirling J. 308

3. —— *Debenture-holder's Action—Party and Party Costs.*
The plaintiff in a debenture-holder's action

COMPANY—*continued.*

is allowed party and party costs of action only. *In re* QUEEN'S HOTEL COMPANY, CARDIFF. *In re* VERNON TIN PLATE COMPANY
Cozens-Hardy J. 792

4. —— *Debenture-holders—Foreign Country, Charge on Property in—Receiver—French Debt—Locality of Debt—Unsecured Creditor—Enforcing Payment—Interference with Receiver—Contempt.*

In October, 1899, receivers were appointed in debenture-holders' actions of the undertaking and of the property whatsoever and wheresoever both present and future of an English company, the order following the wording of the debentures. Among the assets of the company was a debt due to them from a French firm. In November, 1899, P. & Co., English creditors of the company, took proceedings in France for the purpose of attaching the debt due to the company from the French firm. The plaintiffs in the debenture-holders' actions moved to restrain P. & Co. from intercepting, attaching, or taking in execution, or attempting to obtain payment of moneys due to the company from the French firm, or from otherwise interfering with the receivers:—

Held, on the authority of *Liverpool Marine Credit Co.* v. *Hunter*, (1867) L. R. 4 Eq. 62; (1868) L. R. 3 Ch. 479, that the existence of the charge created by the debenture, though valid according to English law, did not entitle the debenture-holders to prevent P. & Co., who were unsecured creditors, from asserting and enforcing any rights given them by French law against this French debt, there being no equity in favour of the debenture-holders as against P. & Co., that the debt due from the French firm must be treated as being situate in France, and subject to French law, and P. & Co. could not be prevented, at the suit of the debenture-holders, from taking any proceedings the law of France allowed for recovering their debt out of this French asset, and that the attachment, which alone was recognised by the law of France, ought to prevail over the title of the debenture-holders:

Held, further, that the appointment of the receivers made no difference; for though the Court can appoint receivers over property out of the jurisdiction, the receiver is not put in possession of foreign property by the mere order of the Court; something else has to be done, and until what is necessary has been done in accordance with foreign law, any person, not a party to the suit, who takes proceedings in a foreign country is not guilty of contempt either on the ground of interfering with the receivers' possession or otherwise, and for this purpose no distinction can be drawn between a foreigner and a British subject. *In re* MAUDSLAY, SONS & FIELD. MAUDSLAY *v.* MAUDSLAY, SONS & FIELD
Cozens-Hardy J. 602

5. —— *Director—Fiduciary Character—Contracts with Company—Declaration of Interest—Collateral Profits.*

By the articles of association of a railway company, it was provided that a director should vacate his office if he was concerned in, or participated in the profits of, any contract with the company without declaring the nature of his interest; but "no director shall vacate his office by reason of his being a member of any corporation, company, or partnership, which has entered into contracts with or done any work for, the company; or by reason of his being interested, either in his individual capacity, or as a member of any company, corporation, or partnership, in any adventure or undertaking in which the company may also have an interest"; but the director was not to vote on contracts of this kind, and if he did, his vote was not to be counted. The railway company, of which F. was a director, shortly after its formation entered into contracts with a steamship company for the carriage and shipment of bananas. F. was the largest shareholder in the steamship company, and was also a partner in the firm that managed it: no disclosure of F.'s interest was made either in the prospectus of the railway company, or when the contracts were entered into. The railway company brought an action against F. to make him liable for all profits received by him, as a shareholder in the steamship company, and as partner in the firm that managed it, under the contracts with the plaintiff company. F. having died before the trial, the action was revived against his executors:—

Held, on the authority of *Imperial Mercantile Credit Association* v. *Coleman*, (1871) L. R. 6 Ch. 558 (which has not been overruled on this point by S. C. (1873) L. R. 6 H. L. 189), and on the articles of association, that F.'s estate was not liable to account for any collateral profits made out of the contracts entered into with the plaintiff company, and that the action must be dismissed. COSTA RICA RAILWAY COMPANY *v.* FORWOOD - - - - Byrne J. 756

6. —— *Memorandum of Association—Alteration of—Absence of Capital—Jurisdiction to Confirm Resolution — Companies (Memorandum of Association) Act*, 1890 (53 & 54 *Vict. c.* 62), *s.* 1, *sub-s.* 1 — *Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 1, *sub-ss.* 1, 2, 3.

The High Court has jurisdiction to wind up a registered unlimited company which has no shares and no capital, and therefore has jurisdiction to sanction an alteration of its memorandum of association. *In re* NORTH OF ENGLAND IRON STEAMSHIP INSURANCE ASSOCIATION
Cozens-Hardy J. 481

7. —— *Memorandum of Association—Double Allotment—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 23—*Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 25—*Companies Act*, 1898 (61 & 62 *Vict. c.* 26), *s.* 1.

The certificate of incorporation of a company operates as the issue of shares subscribed for on the memorandum of association.

Circumstances under which (distinguishing *In re Jarvis & Co.*, [1899] 1 Ch. 193) shares subscribed for on the memorandum of association of a company were held to be the same as shares subsequently applied for by and allotted to a vendor as fully paid up.

Under those circumstances the Court ordered the company to file a contract to take the shares as fully paid up, which should operate as a

COMPANY—*continued.*

sufficient contract to satisfy s. 25 of the Companies Act, 1867, and as if it had been filed on or before the issue of the shares. *In re* WHITEHEAD & BROTHERS, LIMITED **Cozens-Hardy J. 804**

8. —— *Prospectus—Misrepresentation—Misleading Statement—"Untrue Statement"—Director—Promoter—Shareholder—Contract—Rescission—Damages—Compensation—Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3, *sub-s.* 1—*Contract by Company, Directors, or Promoters—Omission from Prospectus—Concealment—"Fraudulent" Prospectus—Waiver Clause in Prospectus or Application Form—Catching Conditions—Notice—Companies Act*, 1867 (30 & 31 *Vict. c.* 131), *s.* 38.

A misleading statement in a prospectus is an "untrue statement" within s. 3, sub-s. 1, of the Directors Liability Act, 1890. The liability imposed by that section for any untrue statement in a prospectus is absolute and is in no way affected by the consideration whether the statement was untrue in the sense in which it was used by those who issued the prospectus. Persons issuing a prospectus containing an untrue statement can only escape liability under the statute by proving that they had "reasonable ground" for believing, and did in fact believe, the statement to be true.

Sect. 38 of the Companies Act, 1867—which enacts that every prospectus shall specify the dates and names of the parties to any contract entered into by the company or the promoters, directors or trustees thereof, and that any prospectus not specifying the same shall be deemed "fraudulent" on the part of the promoters, directors and officers of the company knowingly issuing the same—cannot be evaded by a general waiver clause in the prospectus, or in the form of application for shares, to the effect that a subscriber for shares shall waive all claim for non-compliance with the section. A waiver clause, to be effectual as against a subscriber, must fairly disclose the circumstances which confer the rights which by the clause he agrees not to enforce.

The Court will refuse to give effect, as against a shareholder, to a "tricky" waiver clause in a prospectus or application form, upon the same principles as are applicable to catching conditions of sale as between vendor and purchaser or to general words in releases.

Judgment of Kekewich J. affirmed. GREENWOOD *v.* LEATHER SHOD WHEEL COMPANY **C. A. 421**

9. —— *Share Certificate—Duty of Director—Putting to Rest—Estoppel—Conduct—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 31.

The duty of examining and checking share certificates issued by a company may as a rule be properly left to the secretary. In that case a director is not estopped from denying the accuracy of a certificate passed at a board meeting at which he is present.

Whether the same rule applies to a director who signs the certificate, *quære*.

A certificate, though inaccurate, estops the company from denying its accuracy against any person relying on it, including (unless it is based on a forged transfer lodged by him) the person to whom it is issued, and that person, if put to rest

COMPANY—*continued.*

by the certificate, so as to lose his remedy against his broker or transferor, is entitled to damages against the company.

The onus of proving that there is no present effective remedy against the broker or transferor lies on the person put to rest by the certificate; the onus of proving that there was no effective remedy at the date of the certificate lies on the company.

Knights v. *Wiffen*, (1870) L. R. 5 Q. B. 660, 665, and *Balkis Consolidated Co.* v. *Tomkinson*, [1893] A. C. 396, followed and applied.

Simm v. *Anglo-American Telegraph Co.*, (1879) 5 Q. B. D. 188, distinguished. DIXON *v.* KENNAWAY & Co. **Farwell J. 833**

10. —— *Winding-up—Contributory—Rescission of Contract to take Shares—Time within which to take Proceedings.*

Where a company applied under the Rules of the Supreme Court, Order XIV., for leave to sign final judgment in an action for calls, and leave to defend was obtained by the shareholder upon an affidavit stating his intention to counter-claim for rescission of the contract to take shares on the ground of misrepresentation, and disclosing no other ground of defence, and this occurred before the presentation of a winding-up petition, but the counter-claim was delivered after the petition and before the winding-up order made upon it:—

Held, that the shareholder was not too late to apply for relief.

Ex parte Stevenson, (1867) 16 W. R. 95, distinguished.

Decision of Wright J., [1899] 1 Ch. 770, reversed. *In re* GENERAL RAILWAY SYNDICATE. WHITELEY'S CASE **C. A. 365**

11. —— *Winding-up—Examination, Order for Public—Application to Discharge—Time—Companies (Winding-up) Act*, 1890 (53 & 54 *Vict. c.* 63), *s.* 8.

An application for the discharge of an order for public examination made in chambers, under s. 8 of the Companies (Winding-up) Act, 1890, must be made with reasonable diligence:—

Held, that a delay of two months in making such an application was unreasonable, and that on that ground the application was properly dismissed.

Decision of Wright J., [1899] 2 Ch. 773, affirmed. *In re* NATIONAL STORES, LIMITED **C. A. 27**

12. —— *Winding-up—Liquidator—Appointment—Validity—Notice of Resolution—Voluntary Winding-up.*

As soon as a resolution for the voluntary winding-up of a company is passed, a liquidator may be appointed without special notice; and, in the case of a voluntary winding-up by special resolution, where the notice of the confirmatory meeting includes notice of a resolution for the confirmation of the appointment of a named person as liquidator, and that resolution is dropped, a resolution for the appointment of another person may be proposed and carried without further notice. *In re* TRENCH TUBELESS TYRE COMPANY. BETHELL *v.* TRENCH TUBELESS TYRE COMPANY **C. A. 408**

COMPANY—*continued.*

13. —— *Winding-up—Reconstruction—Scheme of Arrangement with Creditors—Sanction of Court—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 161—*Joint Stock Companies Arrangement Act*, 1870 (33 & 34 *Vict. c.* 104).

A company having passed special resolutions for a voluntary winding-up and the adoption of a scheme of arrangement with their debenture-holders, the scheme was assented to by the statutory majority of the debenture-holders, as provided by the Joint Stock Companies Arrangement Act, 1870.

The scheme provided (inter alia) that a new company should be formed, and that the liquidator should enter into an agreement with that company for the transfer to it of the undertaking and assets of the old company; that the new company should issue debenture stock to the debenture-holders of the old company in satisfaction of their debentures; that every shareholder in the old company should be entitled to claim a share in the new company in respect of each share held by him in the old company; that the new company should not be bound to allot any share unless the member entitled thereto should, within three weeks from the sanction of the scheme by the Court, claim his allotment and make a specified payment on account of the liability thereon; and that as regarded unclaimed shares the liquidator should use his best endeavours to sell the same, and should divide the net proceeds of sale rateably among the non-claiming members of the old company. Subject to the provisions of the scheme, the new company was to take over and discharge all the liabilities of the old company and to indemnify the old company.

Among the special resolutions passed by the shareholders of the old company was one which authorized the directors and the liquidator or either of them "to procure underwriting for all or any of the capital of the new company, on such terms and conditions as they or he may approve, and to pay for the same out of the assets of the company."

In pursuance of this resolution the liquidator entered into two agreements with persons who agreed to apply for and take up all the shares in the new company which should not be taken up by the shareholders in the old company, in consideration of a commission of 3*d.* per share on all the shares of the new company, 250,000 in number.

No shareholder of the old company had given a notice under s. 161 of the Companies Act, 1862, requiring the liquidator to purchase his shares.

Upon a petition under the Joint Stock Companies Arrangement Act, 1870, for the sanction of the Court to the scheme:—

Held, by Cozens-Hardy J., that the underwriting agreements were illegal, and that the Court ought not to sanction the scheme.

The Court of Appeal sanctioned the scheme on the undertaking of the liquidator (1.) to pay the unsecured creditors of the old company in full out of the assets in his hands; (2.) not to act upon the resolution as to underwriting, and to procure the cancellation of the underwriting agreements, and (3.) that three shareholders of the old company who opposed the scheme should, if they elected within three days to dissent from the special resolutions passed by the company, be entitled to all the statutory rights of dissentient shareholders under ss. 161 and 162 of the Companies Act, 1862. *In re* CANNING JARRAH TIMBER COMPANY (WESTERN AUSTRALIA), LIMITED - - - - C. A. 708

14. —— *Winding-up—Surplus Assets—Debentures—Receiver—Principal and Agent—Remuneration—Jurisdiction.*

Debentures gave power to the holders to appoint a receiver to realize the assets of the company, without stating what he was to do with the surplus, or that he was to be the agent of the mortgagors. A receiver appointed under this power claimed to retain surplus assets as his remuneration, and the liquidator of the company applied by summons in the winding-up for an order fixing the remuneration, and that the balance should be paid over to him:—

Held, that the receiver was the agent of the mortgagee, not of the company; and that, whether that were so or not, there was no jurisdiction to make the order on the summons, but the liquidator must bring an action against the receiver. *In re* VIMBOS, LIMITED - Cozens-Hardy J. 470

—— Action — Limitation — Public authorities protection—Company dividing profits
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—— Director—Untrue statements in prospectus—Action, Accruer of cause of - 718
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—— Liquidator — Sale by, of undertaking — Fiduciary relation—Setting aside sale—Interest on profits - - - 167
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—— Proof of debts — Death of shareholder — Liability to future calls - - 173
See BANKRUPTCY. 1.

—— Shares—Withdrawal of offer before acceptance by post - - - 220
See CONTRACT.

—— Solicitor — Authority to defend action in name of company—Dissolution pendente lite—Costs - - - - 43
See PRINCIPAL AND AGENT.

—— Winding-up — Discovery — Discretion of judge—Officer of Government department - - - - - 347
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COMPENSATION — Open contract — Restrictive covenants—Specific performance 815
See VENDOR AND PURCHASER. 2.

CONCURRENCE — Executors — Land transfer—Title—Conveyance - - 58
See VENDOR AND PURCHASER. 9.

CONDITIONS OF SALE—"Outgoings"—Notice by sanitary authority to abate nuisance
See VENDOR AND PURCHASER. 3. 231

CONFLICT OF LAWS—*Contract—Locus Solutionis—Locus Contractus—Form of Contract—Contract to be Performed in Different Countries.*

By an agreement in writing, executed at Johannesburg, in the South African Republic, and made between a company having its regis-

CONFLICT OF LAWS—*continued.*

tered office in London, but carrying on business in South Africa, and a British subject resident at Johannesburg, the latter agreed to serve the company as brewer or otherwise in its business carried on at Johannesburg and in the Colony of Natal and elsewhere in South Africa, and provision was made for his residence in Johannesburg. The agreement was framed in the English language and was in English form:—

Held, that the rights of the parties under the agreement ought to be governed by the law of the South African Republic.

Decision of Kekewich J., [1899] 2 Ch. 173, affirmed. SOUTH AFRICAN BREWERIES, LIMITED *v.* KING - - - - - C. A. 273

—— Power of appointment—Execution—Domiciled foreigner — Unattested will — Validity - - - - 442
See POWER. 3.

CONTEMPT — Receiver, interference with — Charge on property in foreign country—Enforcing payment - - 602
See COMPANY. 4.

CONTINUATION ACCOUNT—Death of principal —Contracts for sale and repurchase after death—Liability - - 209
See STOCKBROKER.

CONTRACT—*Withdrawal of Offer before Acceptance—Acceptance by Post—Company—Shares—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *ss.* 35, 39, 62.

J. applied for shares in a company, but before the letter of allotment was posted—except by being delivered to a postman in a London street to be posted by him—a letter withdrawing his application was delivered at the company's registered office and opened by the secretary. By the rules of the Post Office town postmen are forbidden to take charge of letters for the post:—

Held, that the withdrawal was received by the company before the allotment letter was posted, and that there was no contract by J. to take the shares. *In re* LONDON AND NORTHERN BANK. *Ex parte* JONES - Cozens-Hardy J. 220

—— Conveyance—Written contract—Mistake—Rectification—Parol evidence - 616
See VENDOR AND PURCHASER. 4.

—— Director—Fiduciary character—Contracts with company—Declaration of interest —Collateral profits - - 756
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—— Illegal—Bail to produce prisoner—Indemnity - - - - - 37
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—— Locus solutionis — Locus contractus — Contract to be performed in different countries - - - - 273
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—— Lunatic—Voidable contract—Real estate—Completion of purchase by committee—Conversion - - - - 588
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—— Marriage contract—Promise by wife's father to leave her "a share" of his estate—Specific performance - - 331
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CONTRACT—*continued.*

—— Open contract — Restrictive covenants — Compensation—Specific performance
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—— Rescission—Specific performance—Property used as a disorderly house - 257
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—— Rescission of, to take shares—Time within which to take proceedings—Contributory
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See HUSBAND AND WIFE. 3.

CONTRIBUTORY—Rescission of contract to take shares—Time within which to take proceedings - - - - 365
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CONVERSION—Lunatic—Contract to purchase real estate—Voidable contract—Completion of purchase by committee - 588
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—— Land transfer—Concurrence of all executors
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CONVEYANCING AND LAW OF PROPERTY—Abstract—Leaseholds—Assignment
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—— Forfeiture of lease—Breach of covenant—Notice bad in part - - 496
See LANDLORD AND TENANT. 4.

—— Mortgage—Receiver - - 788
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—— Mortgagee in possession—Specific devise by executor beneficially entitled to mortgage debt - - - - 801
See WILL. 7.

—— Real estate—Executory gift over - 768
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—— Sale under order of Court—Protection of purchaser—Title - - - 370
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COPYRIGHT — *International — Fine Arts — Infringement—Principal and Agent—Penalties—Indecency of Work and Infringements—Costs—Fine Arts Copyright Act*, 1862 (25 & 26 *Vict. c.* 68), *s.* 6 *—International Copyright Act*, 1886 (49 & 50 *Vict. c.* 33), *s.* 2, *sub-s.* 3—*Bern Convention, art.* 2.

The joint effect of s. 2, sub-s. 3, of the International Copyright Act, 1886, and art. 2 of the Bern Convention, is that an author suing in England in respect of an infringement of foreign copyright must prove that he is entitled to protection in the country of origin of the work, but, that right once established, his remedy depends entirely on the English law.

An author whose copyright is infringed in any manner mentioned in s. 6 of the Fine Arts Copyright Act, 1862, is entitled to recover

COPYRIGHT—*continued.*
separate penalties against every infringer, whether principal or agent, master or servant, the minimum penalty in every case being a farthing for each copy by him pirated.

Ex parte Beal, (1868) L. R. 3 Q. B. 387, and *Ellis* v. *Marshall & Son*, (1895) 64 L. J. (Q.B.) 757, followed.

Where an action in respect of infringement of copyright fails on the ground of the indecency of the work, and the indecency has been repeated in the infringements, the action will be dismissed without costs. BASCHET *v.* LONDON ILLUSTRATED STANDARD COMPANY - - Kekewich J. 73

2. —— *Music — Infringement — "Copy" — "Sheet of Music"—Mechanical Organ—Perforated Music Sheet—Musical Directions for Performance —Copyright Act*, 1842 (5 & 6 *Vict. c.* 45), *s.* 2, 15.

The defendants sold for use in a mechanical organ called an "Æolian" perforated rolls of paper representing the musical score of certain songs in the music of which the plaintiffs had the copyright. The rolls were inserted in the organ, and were unrolled by its mechanism when actuated by the performer, so that the passage of air through the perforations in the rolls into the pipes of the organ produced corresponding musical notes the pitch and duration of which were determined by the position and length of the perforations. The organ contained also stops, swells and pedals, whereby variations of pace and expression could be effected at the will of the performer; and in the margin of some of the rolls were directions as to time and expression which were also to be found in the plaintiffs' songs:—

Held (affirming Stirling J., [1899] 1 Ch. 836), that the rolls, so far as they contained perforations, were part of the organ, and were not "copies" of "sheets of music" within the Copyright Act, 1842, and were, therefore, not an infringement of the plaintiffs' copyright; and also (reversing Stirling J.), that, apart from the plaintiffs' musical scores and when not used in connection with them, the plaintiffs' directions as to time and expression were not protected by their copyright. BOOSEY *v.* WHIGHT C. A. 122

COSTS — Copyright — Indecency of work and infringements - - - 73
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—— Debenture-holder's action—Party and party costs - - - - - 792
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—— Drainage expenses—Capital or income 319
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—— Drainage works required by local authority —Liability of tenant—Covenant 128
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—— Railway company—Receivership order— "Proper outgoings in respect of the undertaking" - - - 261
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—— Repairs — Sanitary works — Capital or income - - - - 326
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COSTS—*continued.*
—— Security for—Foreigner resident abroad— General inquiry—Claimant to fund in court - - - - 405
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—— Solicitor — Authority to defend action in name of company—Dissolution pendente lite - - - - - 43
See PRINCIPAL AND AGENT.

—— Solicitor—Voluntary settlement—Revocation — Undue influence — Independent advice - - - - 243
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—— Taxation—Higher and lower scales—Matter in question under amount of 300*l.* 573
See LANCASTER COURT.

—— Taxation at instance of cestui que trust— Bill paid by trustees more than twelve months previously - - - 857
See SOLICITOR. 1.

COUNTY COUNCIL—By-law—Validity—Betting —Streets - - - - 10
See LONDON. 2.

COVENANT—*Building Estate—Restriction as to number of Houses—"House"—Flat—Construction of Covenant.*

A building containing several residential flats constitutes only one house within the meaning of the word "house" in a covenant not to erect more than a certain number of houses, unless there is some context which cuts down or alters the popular interpretation of the word.

Decision of Cozens-Hardy J. affirmed. KIMBER *v.* ADMANS - - - C. A. 412

2. —— *Restrictive Covenant—Tied Public-house — Mortgagor and Mortgagee — Assigns— Underlessee—Notice.*

The owner of a leasehold public-house, subject to a first mortgage, made a second mortgage to the partners in "John Brothers," brewers, in consideration of an advance by them out of their partnership account, the partners being first described separately and afterwards referred to as John Brothers.

By a separate deed of the same date, made between the same parties described as in the second mortgage, the mortgagor in further consideration of the advance covenanted with "John Brothers, their executors, administrators, and assigns," to bind the house to "John Brothers" for the entire supply of beer, wines, and spirits so long as he, his executors, administrators or assigns, should be in possession or occupation.

Both mortgages were subsequent to the Conveyancing Act, 1881.

The transferee of the first mortgage and the assign of the equity of redemption, then in possession, having together made an underlease to the defendant, a publican, with notice of the covenant, the plaintiffs, who had purchased the business of John Brothers together with their right of supply to the public-house, and had taken a transfer of the second mortgage and an assignment of the benefit of the deed of covenant, sought to enforce the tie against the defendant:—

Held, on the construction and intention of the deeds, that—

1. The benefit of the covenant was not limited

COVENANT—*continued.*
to the original firm of John Brothers, but ran with their business.

2. The covenant bound any one deriving title under the original mortgagor, including an underlessee with notice, who, though not an assign, could be bound in equity by a restrictive covenant.

3. The defendant, though apparently deriving title to his underlease under the first mortgagee as well as under the mortgagor in possession, must, according to the rule in *Roach* v. *Wadham*, (1805) 6 East, 289, be considered to hold under the better title, which, having regard to s. 18, sub-s. 1, of the Conveyancing Act, 1881, was that derived from the mortgagor in possession. He could not, therefore, set up the paramount title of the first mortgagee against the plaintiffs.

4. On the above grounds the plaintiffs were entitled to enforce the tie against the defendant. JOHN BROTHERS ABERGARW BREWERY COMPANY *v.* HOLMES - - - **Kekewich J. 188**

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—— Breach of covenant—Forfeiture of lease—Notice bad in part - - - 496
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—— Compensation—Open contract—Restrictive covenant—Specific performance - 815
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—— Costs of drainage works required by local authority—Liability of tenant - 128
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—— For quiet enjoyment—Breach by erection of buildings causing lessee's chimneys to smoke - - - - 642
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—— For title—Conveyance—Written Contract—Mistake—Rectification—Parol evidence.
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—— Restrictive covenant prohibiting sale of beer and spirits—Continuing covenant broken for an uninterrupted period of twenty-four years—Waiver - 108
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DAMAGES — Measure of — Patented articles bought in England and sent abroad for sale—Infringement - - 577
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—— Trustee carrying on business—Tort—Right of trustee to indemnity - - 199
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DEBT—Order in which funds applied in payment of debts—Power of appointment—Administration - - - 152
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DIRECTOR — Fiduciary character — Contracts with company—Declaration of interest Collateral profits - - - 756
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—— Liability—Prospectus — Misleading statement—"Untrue statement" - 421
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—— Share certificate—Duty of director—Putting to rest—Estoppel - - - 833
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DISCHARGE—Application to—Order for public examination—Time—Winding-up 27
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DISCLAIMER—Label—Distinctive words common to the trade—"Addition" - 114
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—— Patent action—Petition for revocation—Liberty to apply for leave to amend by disclaimer - - - - 508
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DISCOVERY — Company — Winding-up — Discretion of judge—Officer of Government department - - - - 347
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DISCRETION—Common accounts refused at the trial—Misconduct of trustee - 225
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DISSOLUTION—Solicitors' business—Right to use of name of old firm - - 551
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DISTRESS—*Mortgage—Receiver—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *ss.* 19 (*iii.*), 24, *sub-ss.* 1, 2, 3.
Where a receiver of the rents of mortgaged property has been appointed by the mortgagee, the mortgagor cannot distrain without the receiver's authority even after the receiver has refused to do so. WOOLSTON *v.* Ross
Cozens-Hardy J. 788

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See WAY.

"ELDEST SON"—Entitled to possession—Construction of will - - - 795
See WILL. 4.

ELEGIT—Sheriff—Duty to file writ and inquisition - - - - - 296
See JUDGMENT.

EQUITY OF REDEMPTION—Clog on—"Tied" public-house - - - 213
See MORTGAGE. 1.

ESTATE DUTY—Gift within twelve months of death—Ademption—Advancement—Account - - - - 771
See WILL. 2.

—— Settlement estate duty—Incidence - 565
See REVENUE.

ESTOPPEL—Laches and acquiescence—Public body—Agreement to admit foreign sewage—Injunction - - 695
See LONDON. 1.

—— Share—Certificate—Duty of director—Putting to rest - - - 833
See COMPANY. 9.

EVIDENCE—*Practice—Status and Boundaries of Foreign State—Judicial Cognizance—Application to Foreign Office.*
The Court takes judicial cognizance not only of the status, but also of the boundaries of foreign States, and if in doubt will apply for information to the Secretary of State for Foreign Affairs, whose reply is conclusive. FOSTER *v.* GLOBE VENTURE SYNDICATE, LIMITED Farwell J. 811

—— Parol evidence—Conveyance—Written contract—Mistake—Rectification - 616
See VENDOR AND PURCHASER. 4.

—— Way—"Claiming right thereto"—Easement—Prescription - - 592
See WAY.

EXAMINATION—Winding-up of company—Order for public examination—Application to discharge—Time - - 27
See COMPANY. 11.

EXECUTION—Charging order—Death of judgment debtor—Leave to issue execution against executor - - - 386
See PRACTICE. 1.

—— Judgment creditor tenant by elegit—Rent—Liability to indemnify lessee - 296
See JUDGMENT.

—— Power of appointment—Domiciled foreigner—Unattested will—Validity - 442
See POWER. 3.

EXECUTOR—Concurrence of all executors—Land transfer—Title—Conveyance - 58
See VENDOR AND PURCHASER. 9.

—— Leave to issue execution against executor—Charging order—Death of judgment debtor - - - - 386
See PRACTICE. 1.

—— Mortgagee in possession—Specific devise by executor beneficially entitled to mortgage debt - - - - 801
See WILL. 7.

FALSE REPRESENTATION—*Fraud—Trade Rivalry—Unfair Competition—Testimonials, Improper Use of—Cause of Action—Interlocutory Injunction.*
The plaintiff having invented a system of treating diseases by hot air, there appeared in a medical paper an article containing a favourable account of this system, with particulars of its application to specific cases. The defendant, who was the inventor of a rival system of hot-air treatment, circulated amongst the patients of the plaintiff a pamphlet containing extracts from this article, but the extracts omitted all mention of the plaintiff's name, and were so made as to induce the belief that the article, and the specific statements of fact therein, related to the defendant's system. There was evidence that some of the plaintiff's patients were misled by these extracts, but no evidence of any actual damage. Upon motion for injunction:—
Held, by Stirling J., that, in the absence of any attempt by the defendant to pass off his system as the plaintiff's, the Court ought not to interfere by way of interlocutory injunction.
Franks v. *Weaver*, (1847) 10 Beav. 297; 8 L. T. (O.S.) 510, explained and distinguished.

FALSE REPRESENTATION—*continued.*

The principle of *Batty* v. *Hill*, (1863) 1 H. & M. 264, followed. TALLERMAN *v.* DOWSING RADIANT HEAT COMPANY - - C. A. 1

FIDUCIARY RELATION — Concealment — Setting aside sale—Liability of liquidator—Interest on profits - - - 167
See VENDOR AND PURCHASER. 7.

—— Director—Contracts with company — Declaration of interest—Collateral profits
See COMPANY. 5. 756

—— Undue influence—Independent advice—Voluntary settlement — Revocation — Duty of solicitor—Costs - - 243
See SETTLEMENT.

FINANCE ACTS—Settlement—Estate duty—Incidence - - - - 565
See REVENUE. 1.

FINE ARTS — Infringement — Principal and agent—Penalties — International copyright - - - - - 73
See COPYRIGHT. 1.

FLAT — Building estate — Restriction as to number of houses—"House" - 412
See COVENANT. 1.

FOREIGN DOMICIL — Payment to tuteur — Money in English bank—Foreign Court—Declaration of lunacy - - 80
See LUNACY. 2.

FOREIGN STATE—Status and boundaries of—Practice—Judicial cognizance—Application to Foreign Office - - 811
See EVIDENCE.

FOREIGNER—Costs—Security for — Foreigner resident abroad — General inquiry — Claimant to fund in court - - 405
See PRACTICE. 3.

—— Power of appointment—Exercise by will — Foreign domicil of testatrix - 492
See POWER. 1.

—— Unattested will — Validity — Domiciled foreigner - - - - 442
See POWER. 3.

FORFEITURE—Lease — Breach of covenant — Notice bad in part - - - 496
See LANDLORD AND TENANT. 4.

FRAUD—Prospectus or application form, Waiver clause in—Catching conditions—Notice
See COMPANY. 8. 421

—— Trade rivalry—Improper use of testimonials—Interlocutory injunction - 1.
See FALSE REPRESENTATION.

FRAUDS, STATUTE OF—*Landlord and Tenant—Agreement for further Lease—Memorandum—Lessee not Named—Person who paid 50l.—Sufficient Description.*

A landlord verbally agreed to grant his tenant, the assign of an existing lease of the Warden Arms, a further lease of twenty-four years for a fine of 50*l.*, on receipt of which sum in cash the landlord signed and handed to the tenant the following memorandum:—

". . . . Dear Sir,—In consideration of you having this day paid me the sum of 50*l.* . . . . I hereby agree . . . . to grant you . . . . a further lease of 24 years . . . . of . . . . the Warden Arms . . . . to run immediately after the expiration of . . . . the now existing lease . . . ."

The name of the proposed lessee was not stated in this memorandum:—

Held, that, for the purposes of the Statute of Frauds, the proposed lessee was sufficiently described as the person who had paid the 50*l.*

Whether the reference to a further lease would by itself have identified the proposed lessee with the existing tenant, *quære*. CARR *v.* LYNCH
Farwell J. 613

FRENCH DEBT—Receiver— Debenture-holders—Charge on property in foreign country—Enforcing payment—Contempt 602
See COMPANY. 4.

GROUND-RENT—Cost of sanitary works—Leasehold houses—Capital or income - 326
See TENANT FOR LIFE AND REMAINDERMAN. 1.

GUARDIANS OF POOR—Strike of workmen—Persons entitled to relief—Jurisdiction—Powers of Local Government Board
See POOR LAW. 516

HIGHWAY — *Obstruction — Reasonable User—Loading and Unloading of Goods—Public Nuisance—Injunction.*

In a case of doubt or difficulty the right of the occupier of premises abutting on a highway to make a reasonable use of it, for the purpose of loading and unloading goods at his premises, must yield to the public right of unobstructed passage along the highway.

It is in each case a question of degree whether the exercise of this private right of access to premises, which must of necessity involve some obstruction of the highway, is or is not reasonable, and in determining this question regard must be had to all the facts of the case.

Traders carrying on a large business in a populous town, at premises situate in a street the roadway of which was less than twenty feet wide, kept as many as six vans at once during every alternate hour in the daytime loading and unloading goods at their premises, thus occupying half the width of the street, and seriously obstructing the passage of vehicles through it:—

Held, that this was an unreasonable use of the highway, and that it amounted to a public nuisance the continuance of which must be restrained by injunction. ATTORNEY-GENERAL *v.* BRIGHTON AND HOVE CO-OPERATIVE SUPPLY ASSOCIATION - - - - C. A. 276

—— Repair of road—Road transferred to local authority—Failure of trust - 31
See CHARITY.

HOTCHPOT CLAUSE—Rent—Set-off — Statutes of Limitations - - - 292
See WILL. 5.

HUSBAND AND WIFE—*Marriage Contract—Promise by Wife's Father to leave her "a Share" of his Estate—Specific Performance.*

In 1873 a father, prior to the marriage of his

HUSBAND AND WIFE—*continued.*

daughter, in a letter to her intended husband stated: "You are of course aware that with my large family Eliza will have little fortune. She will have a share of what I leave after the death of her mother, who I wish to leave in comfortable independence if I should leave her a widow." The intended husband accepted the letter as giving him some rights, and the marriage took place. The father afterwards acquired a large fortune, and died in 1898. His wife predeceased him. By his will he left a legacy of 2000*l.* to the daughter, and gave the residue of his estate equally between six of his other seven children. The daughter and her husband claimed by virtue of the letter to be entitled to an equal eighth share of the father's estate:—

Held, first, that the letter did not constitute a contract by the father, but was merely an expression of his intentions; secondly, that if it were a contract, it was an obligation to leave, not an equal eighth share, but some portion or share of his estate to the daughter, and was fulfilled by the legacy. *In re* FICKUS. FARINA *v.* FICKUS
Cozens-Hardy J. 331

2. —— *Practice — Attachment — Process — Married Woman Administratrix—Order for Payment into Court—Form of Order—Non-compliance with Order—Debtors Act*, 1869 (32 & 33 *Vict. c.* 62), *ss.* 4, 5—*Married Women's Property Act*, 1882 (45 & 46 *Vict. c.* 75), *s.* 1, *sub-s.* 2; *ss.* 18, 24—*Rules of Supreme Court*, 1883, *Order* XLII., *rr.* 4, 24.

Where a married woman administratrix is ordered to pay into court a sum of money belonging to the estate of the intestate and shewn by her account of the intestate's personal estate to be in her possession, in the absence of any evidence that she has committed a devastavit, the order should be in the common form and should not be restricted to payment out of her separate estate; and if she fails to comply with the order the Court has jurisdiction to make an order for attachment against her.

Scott v. *Morley*, (1887) 20 Q. B. D. 120, explained and distinguished.

But *semble*, if the object of the order had been, not for the better securing of the fund, but to compel the married woman to make good a loss occasioned by her devastavit, the order should have been made in the form prescribed in *Scott* v. *Morley*, and she would not have been liable to attachment for non-compliance with it. *In re* TURNBULL. TURNBULL *v.* NICHOLAS
Stirling J. 180

3. —— *Wife's Tort—Contract—Liability of Husband.*

In July, 1898, the defendant G. K., the wife of the defendant H. K., requested the plaintiff to join her in the purchase of some shares, and asked her to raise a sum of 2000*l.* to be invested in the purchase of the shares, holding out as an inducement to the plaintiff that she would by means of the investment be able in three months to repay the plaintiff the sum of 5300*l.* which she then owed her. The plaintiff agreed to raise the 2000*l.* when the shares had been purchased. Shortly afterwards the plaintiff, relying on the representation of the defendant G. K. that she had bought the shares, signed two promissory notes for 1000*l.* each, and, her solicitor having discounted them, paid the proceeds to the said defendant, and the plaintiff paid the notes on maturity.

The defendant G. K. never in fact purchased the shares.

In an action for damages by the plaintiff against the defendant G. K. and her husband:—

Held, that the contract was effected prior to and independent of the fraud complained of, and that the fraud was not the means of effecting the contract in the sense in which that expression is used in *Liverpool Adelphi Loan Association* v. *Fairhurst*, (1854) 9 Ex. 422, and that on the authority of that case and of the case of *Wright* v. *Leonard*, (1861) 11 C. B. (N.S.) 258, the husband was liable in damages for his wife's deceit. EARLE *v.* KINGSCOTE - Byrne J. 203

—— Married woman—Restraint on anticipation—Insolvent estate—Appropriation of capital sum—Administration - - 162
See ANNUITY.

ILLEGAL CONTRACT—Bail to produce prisoner—Indemnity - - - 37
See BAIL.

IMPROVEMENTS—Drainage expenses—Capital or income - - - - 319
See TENANT FOR LIFE AND REMAINDERMAN. 2.

—— Prospective order—Tenant for life—Capital money - - - - 461
See SETTLED LAND. 1.

INCOME—Capital or—Leasehold houses—Costs 319, 326
See TENANT FOR LIFE AND REMAINDERMAN. 1, 2.

INDECENCY—Infringement of copyright—Costs
See COPYRIGHT. 1. 73

INDEMNITY—Bail to produce prisoner—Illegal contract - - - - 37
See BAIL.

—— Judgment creditor tenant by elegit—Rent—Liability to indemnify lessee - 296
See JUDGMENT.

—— Trustee carrying on business—Tort—Damages against trustee—Subrogation 199
See TRUSTEE.

INFANT—Real estate of infant—Request—Order for sale—Conversion—Carrying over infant's share - - - - 101
See PARTITION.

INFRINGEMENT—Copyright - 73, 122
See COPYRIGHT. 1, 2.

—— Patent - - - - 508, 577
See PATENT. 1, 2.

—— Trade-mark - - - - 651
See TRADE-MARK. 2.

INJUNCTION—Highway—Obstruction—Reasonable user—Loading and unloading of goods - - - - 276
See HIGHWAY.

INJUNCTION—*continued.*

—— Interlocutory—Trade rivalry—Fraud—Improper use of testimonials - 1
See FALSE REPRESENTATION.

—— Local authority—Powers—Land required for particular purpose—Application to another permanent purpose - 51
See LOCAL GOVERNMENT. 1.

—— Sewage, agreement to admit foreign—Public body—Estoppel—Laches and acquiescence - - - - 695
See LONDON. 1.

INN—Forfeiture clause of premises used as an inn or spirit shop—Waiver 112, n.
See VENDOR AND PURCHASER. 6.

——Restrictive covenant—Prohibiting sale of beer and spirits—Continuing covenant broken for an uninterrupted period of twenty-four years—Waiver - 108
See VENDOR AND PURCHASER. 5.

——Restrictive covenant—Tied public house—Mortgagor and mortgagee—Assigns—Underlessee—Notice - - 188
See COVENANT. 2.

—— "Tied" public-house—Clog on redemption - - - - - 213
See MORTGAGE. 1.

INSOLVENT ESTATE.
See Cases under BANKRUPTCY.

INSPECTION OF DOCUMENTS—Discovery
See PRACTICE. 4, 5. 347, 376

INSURANCE, LIFE—*Repudiation of Assurer's Liability—Action for Declaration of Liability brought before Death of Assured.*

P. insured his life with the defendants, and assigned the policy to the plaintiff. After two premiums had been paid the defendants refused to receive any further premium, and repudiated liability on the policy. Plaintiff brought an action in the lifetime of P., claiming a declaration that the policy was valid, and an injunction to restrain the defendants from repudiating it:—

Held, that, on the defendants undertaking that if an action was hereafter brought on the policy they would not rely as a defence on the non-payment of premiums on the due-days, the action would be dismissed. HONOUR *v.* EQUITABLE LIFE ASSURANCE SOCIETY OF THE UNITED STATES - - - - **Buckley J. 852**

—— Mortgage—Surrender of policy—Payment "in the meantime"—Payment by mortgagor or his agent - - - 774
See MORTGAGE. 2.

INTEREST—On profits—Setting aside sale—Sale by liquidator of undertaking of company—Fiduciary relation - - 167
See VENDOR AND PURCHASER. 7.

—— Sale - - - - - - 337
See BILL OF SALE. 1.

INTERLOCUTORY INJUNCTION—Trade rivalry—Fraud—Improper use of testimonials
See FALSE REPRESENTATION. 1

INTERNATIONAL COPYRIGHT—Fine arts—Infringement—Principal and agent—Penalties - - - - 73
See COPYRIGHT. 1.

INVESTMENTS—Increase of value of investments—Appointment - - 730
See POWER. 2.

"ISSUE"—"Children"—Construction of will
See WILL. 6. 417

JOINT TENANTS—Absolute gift—Secret trust—Notice - - - - 237
See WILL. 1.

JUDGMENT—*Execution—Judgment against Lessee for Years—Writ of Elegit—Judgment Creditor Tenant by Elegit—Liability to indemnify Lessee against Payment of Rent—Distress—Practice—Sheriff—Duty to file Writ and Inquisition.*

C., who was lessee of land for a term of years, mortgaged the same to the plaintiffs by way of sub-demise, less the last three days of the term, and covenanted to pay the rent and perform the covenants in the lease. The defendant, who was the owner of the demised property subject to C.'s term, recovered judgment against her in the Queen's Bench Division for two quarters' rent, and sued out a writ of elegit under which the sheriff, after inquisition, delivered the property to him. After the inquisition the plaintiffs appointed a receiver under their mortgage. The defendant recovered nothing under his judgment and took no further steps under the elegit, but afterwards distrained on the property for a further half-year's rent. In an action to restrain the distress:—

Held, (1.) that, assuming the defendant was by virtue of the elegit an assignee of C.'s term, he only took it for a limited purpose, and could not be treated (on the principle of *Moule* v. *Garrett*, (1872) L. R. 7 Ex. 101) as surety for her and bound to indemnify her against the payment of the rent; (2.) that the property was delivered to the defendant, not in respect of the mere reversion expectant on the determination of the sub-demise, but to the extent of C.'s interest as mortgagor in possession; that that interest was determined by the appointment of the receiver, and consequently the title of the defendant as tenant by elegit had either been extinguished or suspended:

Held, therefore, that the defendant was entitled to distrain.

It is the duty of the sheriff, after executing a writ of elegit, to have the writ and inquisition filed in the Central Office. It is not sufficient, though it has been common, to deliver such documents to the plaintiff's solicitor. JOHNS *v.* PINK - - - - **Stirling J. 296**

—— Charging order—Death of judgment debtor—Leave to issue execution against executor - - - - 386
See PRACTICE. 1.

JURISDICTION—Costs—Railway company—Receivership order—"Proper outgoings in respect of the undertaking" - 261
See PRACTICE. 2.

—— Guardians of poor—Strike of workmen—Persons entitled to relief—Powers of Local Government Board - - 516
See POOR LAW.

JURISDICTION—*continued.*

—— Pauper lunatic—Application of property—Discretion - - - - 249
See LUNACY. 3.

—— Receiver—Remuneration—Surplus assets—Debentures - - - - 470
See COMPANY. 14.

—— To confirm resolution—Memorandum of Association—Alteration of—Absence of capital - - - - 481
See COMPANY. 6.

LABEL—Distinctive words common to the trade—"Addition"—Disclaimer - 114
See TRADE-MARK. 1.

LACHES—Power of sale—Action to set aside sale - - - - - 29
See MORTGAGE. 3.

LANCASTER COURT—*Practice—Costs—Taxation—Higher and Lower Scales—Matter in question under Amount of* 300*l.*—*Chancery Court of Lancaster—Orders of November* 27 *and* 28, 1884.

The Order of the Chancery Court of the County Palatine of Lancaster of November 28, 1884, "as to Court Fees and Solicitors' Costs," which prescribes the fees and costs to be allowed "in any case in court under the amount or value of 300*l.*," applies only to cases under that amount or value to which, but for that order, the lower scale of fees and costs established by the Orders of November 27, 1884, as to Court Fees and Solicitors' Costs would have applied. *In re* MANCHESTER REAL ICE SKATING AND SUPPLY COMPANY - - - - C. A. 573

LAND TRANSFER—Concurrence of all executors—Title—Conveyance - - 58
See VENDOR AND PURCHASER. 9.

—— Middlesex deeds—Rectification of register
See MIDDLESEX REGISTRY. 505

LANDLORD AND TENANT—*Lease—Covenant by Lessor not to let adjoining Land for Purposes of a Trade—Lessee not entitled to enforce Covenant as to User between Lessee of adjoining Land and Lessor.*

The defendant W., the owner of a row of houses, let No. 3 to H. as a shop for carrying on a specified business. The lessee covenanted to use the premises for that business only, and the lessor covenanted not to let any of the other houses for the purposes of the same business. The plaintiff was the assignee of H.'s lease, continuing the business.

Afterwards W. let No. 1 to the defendant B., taking a covenant from B. to use the premises only for the purposes of another specified business.

The defendant B. sold various articles which, as the Court found, were comprised in the plaintiff's business:—

Held, that W. had broken no covenant of his own, and was not bound to sue B. for the breach of his covenant with W. at the request of the plaintiff, who was neither covenantee nor assignee of B.'s covenant; and the plaintiff, therefore, could sue neither W. nor B.

Kemp v. *Bird*, (1877) 5 Ch. D. 549, 974, followed, notwithstanding *Fitz* v. *Iles*, [1893] 1 Ch. 77. ASHBY *v.* WILSON **Kekewich J.** 66

LANDLORD AND TENANT—*continued.*

2. —— *Lease—Covenant by Tenant to Pay and Discharge "all Taxes, Rates, Duties and Assessments payable in respect of the demised Premises"—Cost of Drainage Works required by Local Authority—Liability of Tenant—Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *s.* 85—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *ss.* 64, 96.

A tenant covenanted with his landlord that he would pay and discharge "all taxes, rates, duties and assessments whatsoever, which now are, or hereafter shall become, payable for or in respect of the premises hereby demised, or any part thereof, whether parliamentary, parochial or otherwise, except the landlord's property tax":—

Held, that under this covenant the tenant was liable to pay the cost of drainage works, the execution of which was required by the local authority under s. 85 of the Metropolis Management Act, 1855.

Decision of Byrne J. affirmed.

Brett v. *Rogers*, [1897] 1 Q. B. 525, approved. FARLOW *v.* STEVENSON - - C. A. 128

3. —— *Lease—Covenant for Quiet Enjoyment—Breach by Erection of Buildings on adjoining Land causing Lessee's Chimneys to Smoke.*

The defendant was the owner of two adjoining pieces of land. On one of these he erected a house which he demised to the plaintiff, with whom he covenanted for quiet enjoyment without any interruption or disturbance from or by the lessor, or any person lawfully or equitably claiming under him. The defendant then erected on the other piece of land buildings of such a height that they caused the chimneys of the plaintiff's house to smoke badly:—

Held, that the defendant had broken his covenant. TEBB *v.* CAVE - **Buckley J.** 642

4. —— *Lease—Forfeiture—Breach of Covenant—Notice bad in part—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 14.

A notice under s. 14 of the Conveyancing Act, 1881, referring to several distinct alleged breaches of covenant is not invalidated in toto because it turns out that although some of the alleged breaches have occurred the others have never taken place, or that the lessor is not entitled to rely on them.

Horsey Estate, Limited v. *Steiger*, [1899] 2 Q. B. 79, and *In re Serle*, [1898] 1 Ch. 652, distinguished. PANNELL *v.* CITY OF LONDON BREWERY COMPANY - - **Buckley J.** 496

—— Lease—Agreement for further lease—Lessee not named—Person who paid 50*l.*—Sufficient description - - 613
See FRAUDS, STATUTE OF.

—— Lease—Agreement for, of undivided moiety—Mineral property—Specific performance - - - - - 341
See MINES.

—— Lease of surface—Reserving minerals—Tenant for life - - - 90
See SETTLED LAND. 2.

LANDLORD AND TENANT—*continued.*
—— Waste—Sub-demise for purpose of rubbish shoot—Alteration of nature of demised premises - - - - 624
See WASTE.

LEASE.
See LANDLORD AND TENANT.

LEASEHOLDS—Abstract—Assignment - 287
See VENDOR AND PURCHASER. 1.

—— Capital or income—Costs - 319, 326
See TENANT FOR LIFE AND REMAINDERMAN. 1, 2.

—— Waste - - - - - 160
See TENANT FOR LIFE AND REMAINDERMAN. 3.

LIEN—Calls—Arrears—Debts—Unpaid shares
See COMPANY. 1. 656

LIFE INSURANCE.
See INSURANCE, LIFE.

LIMITATIONS, STATUTE OF—*Charge on Land—Term of Years—Express Trust—Two Sums secured by One Term—Power of Trustees, entitled to raise One Sum, to raise the other also—Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *ss.* 8, 10—*Power of Appointment—Exercise by Residuary Bequest in Will—Assets—Administration—Order in which Funds applied in Payment of Debts—Wills Act*, 1837 (7 *Will.* 4 *and* 1 *Vict. c.* 26), *s.* 27.

A conveyance of land to trustees for a term of years upon trust to raise specific sums of money is an express trust within s. 10 of the Real Property Limitation Act, 1874.

Where land is conveyed to trustees for a term of years upon trust to raise two sums of money, and it is held, in an action brought to recover both sums, that they are entitled to enter and raise one of these sums, but that the other is barred by the Real Property Limitation Act, 1874, the right to raise the second sum is not preserved by the success of the action in respect of the first sum.

Where a power of appointment is exercised by a general bequest in a will the property appointed is included in and passes by the bequest according to the terms of the will, and not as if a separate execution of the power were read into the will. The property is therefore not necessarily postponed, as a fund liable for payment of his debts, to other assets of the testator. WILLIAMS *v.* WILLIAMS. *In re* HARTLEY. WILLIAMS *v.* JONES - - - - North J. 152

2. —— *Company—Director—Untrue Statements in Prospectus—Action by Shareholder for Compensation—Accruer of Cause of Action—Directors Liability Act*, 1890 (53 & 54 *Vict. c.* 64), *s.* 3—*Civil Procedure Act*, 1833 (3 & 4 *Will.* 4, *c.* 42), *s.* 3.

Sect. 3 of the Civil Procedure Act, 1833, which provides that "all actions for penalties, damages or sums of money given to the party grieved by any statute" must be brought within two years after the cause of action, applies only to penal actions—i.e., actions for penalties, or damages or sums of money in the nature of penalties, and does not apply to an action by a shareholder in a company, under s. 3 of the

LIMITATIONS, STATUTE OF—*continued.*
Directors Liability Act, 1890, to recover from the directors compensation for loss or damage sustained by him by reason of untrue statements in the prospectus of the company on the faith of which he subscribed for his shares.

Semble, that the cause of action in such a case accrues at the time when the shares are subscribed for, and that the action must, under the statute 21 Jac. 1, c. 16, be brought within six years from that date.

Decision of Kekewich J., [1899] 2 Ch. 523, affirmed. THOMSON *v.* LORD CLANMORRIS C. A. 718

3. —— *Dispossession of Land—Inference from Equivocal Acts—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *s.* 3.

The defendants were the owners of two fields between which was a strip of land separated from them by hedges. This strip had been conveyed to the defendants with the fields, but the plaintiffs had a right of way over it to a field belonging to them. The strip was originally open at both ends, the end farthest from the plaintiff's field communicating with a public road. More than twelve years before the commencement of the action the plaintiffs had erected a gate at each end of the strip, and had since kept these gates locked, the keys being retained by themselves or their tenants. The gate at the road end of the strip was placed upon the strip; it was not clear whether the other gate was placed on the strip or on the plaintiffs' own land. The action was brought to restrain the defendants from trespassing on the strip. There was no evidence that the plaintiffs had erected the gates with the intention of excluding the defendants from the strip:—

Held, that, as the act of the plaintiffs in erecting and locking the gates was in its nature equivocal and might have been done merely with the intention of protecting the plaintiffs' right of way from invasion by the public, the defendants had not been dispossessed of the strip of land, and the plaintiffs had not acquired a title to it under the Statute of Limitations.

The action was accordingly dismissed. LITTLEDALE *v.* LIVERPOOL COLLEGE - - C. A. 19

—— Policy—Surrender—Payment "in the meantime"—Payment by mortgagor or his agent - - - - 774
See MORTGAGE. 2.

—— Public authorities protection—Action—Company dividing profits - - 749
See ACTION.

—— Rent—Hotchpot clause—Set-off - 292
See WILL. 5.

LIQUIDATOR—Appointment—Validity—Notice of resolution—Voluntary winding-up
See COMPANY. 12. 408

LOCAL GOVERNMENT—*Local Authority—Powers—Land acquired for Particular Purpose—Part not required for that Purpose—Application to another Permanent Purpose—Local Government Board—Jurisdiction—Practice—Parties—Injunction—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 175, 295.

Sect. 175 of the Public Health Act, 1875,

LOCAL GOVERNMENT—*continued.*
enables the Local Government Board to direct a local authority to retain land that by no possibility can ever be required for the original purpose for which it was acquired, but it does not enable the board to direct the land to be applied to any purpose permanently inconsistent with that original purpose.

Attorney-General v. *Teddington Urban Council*, [1898] 1 Ch. 66, followed.

If there is a possibility of the land being eventually required for the original purpose the section is inapplicable.

An order of the board made without jurisdiction is not rendered valid by s. 295.

The residuum of interest remaining in the owner of the lands from which the particular land was severed for the original purpose only, his right of pre-emption under s. 128 of the Lands Clauses Consolidation Act, 1845, and the injury (though not amounting to a nuisance) likely to arise to his adjoining lands, severally entitle him to apply to the Court for an injunction to restrain any unlawful user of the particular land. ATTORNEY-GENERAL *v.* HANWELL URBAN DISTRICT COUNCIL - - - - **Kekewich J. 51**

2. —— *Private Street Works—Charge of Expenses on Frontager's Premises—Date from which Charge takes Effect—"Completion of Works" or "Final Apportionment"—Vendor and Purchaser —"Outgoings"—Implied Covenant against Incumbrances—Private Street Works Act*, 1892 (55 & 56 *Vict. c.* 57), *ss.* 1, 12, 13.

The amount of the apportioned expenses of private street works executed by a local authority under the Private Street Works Act, 1892, becomes a charge on the premises in respect of which they are apportioned as from the date of the completion of the works, and not merely as from the date of the final apportionment.

If, therefore, the premises are sold by the owner free from incumbrances after the completion of the works, but before the date of the final apportionment, the vendor must indemnify the purchaser against the sum finally apportioned in respect of the premises.

Decision of Kekewich J., [1899] 2 Ch. 496, affirmed. STOCK *v.* MEAKIN - - **C. A. 683**

3. —— *Sewers—Prescriptive Right of Drainage—Trade Effluents—Polluting Liquid—Public Health Act*, 1875 (38 & 39 *Vict. c.* 55), *ss.* 17, 21—*Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 17, *sub-s.* 1—*Rivers Pollution Prevention Act*, 1876 (39 & 40 *Vict. c.* 75), *ss.* 4, 7, 16—*West Riding of Yorkshire Rivers Act*, 1894 (57 & 58 *Vict. c. clxvi.*), *ss.* 9, 10.

Where the owners of buildings have acquired a right to discharge drainage into a public sewer through a connection lawfully made, that right extends to the discharge of trade and manufacturing effluents, and the provisions of s. 7 of the Rivers Pollution Prevention Act, 1876, do not justify a local sanitary authority in cutting off the connection with their sewer, even although it is shewn that the discharge of the trade effluent prejudicially affects the disposal of the sewage matter conveyed through the sewer.

The decision of Charles J. in *Peebles* v. *Oswaldtwistle Urban Council*, [1897] 1 Q. B. 384, on this point followed. EASTWOOD BROTHERS, LIMITED *v.* HONLEY URBAN COUNCIL - **Byrne J. 781**

—— Guardians of poor — Jurisdiction — Persons entitled to relief — Powers of Local Government Board - - **516**
See POOR LAW.

—— Streets—Betting—London County Council —By-law—Validity - - **10**
See LONDON. 2.

LOCUS SOLUTIONIS — Locus contractus — Contract to be performed in different countries - - - - **273**
See CONFLICT OF LAWS.

LONDON—*Drainage and Sewerage—Metropolitan Drainage System — Agreement to admit Foreign Sewage—Public Body—Injunction—Ultra Vires—Estoppel — Laches and Acquiescence — Metropolis Management Act*, 1855 (18 & 19 *Vict. c.* 120), *ss.* 135, 138, 140, 250—*Metropolis Management Amendment Act*, 1862 (25 & 26 *Vict. c.* 102), *s.* 61.

Under s. 61 of the Metropolis Management Amendment Act, 1862, the vestry of a parish within the metropolitan area cannot, even with the consent of the London County Council, enter into a binding agreement to receive sewage from a district without the metropolitan area.

The reasoning of Hall V.-C. in *Metropolitan Board of Works* v. *London and North Western Ry. Co.*, (1880) 14 Ch. D. 521; (1881) 17 Ch. D. 246, approved.

Where the plaintiffs, the vestry of a parish within the metropolitan area, made an arrangement with certain landowners of a district without the metropolitan area (now represented by the defendants, the urban district council) whereby the discharge of some sewage from the defendants' district into a sewer belonging to the plaintiffs had been permitted for many years, and this additional sewage had increased so as periodically to choke up the plaintiffs' sewer:—

Held, that this arrangement operated in law merely as a revocable licence, and that the plaintiffs, being a public body with public duties to perform, were not estopped or precluded by laches or acquiescence from bringing an action for an injunction to restrain the defendants from using the sewer; but

Held, that, having regard to the conduct of the plaintiffs and to the difficulty in which an injunction would place the defendants by compelling them to close their sewers, the Court ought only to make a declaration that the defendants were not entitled to send sewage from their district into the plaintiffs' sewer without the consent of the plaintiffs. ISLINGTON VESTRY *v.* HORNSEY URBAN COUNCIL - - - **C. A. 695**

2. —— *Streets—London County Council—By-law—Validity—Betting—Wagering — Municipal Corporations Act*, 1882 (45 & 46 *Vict. c.* 50), *s.* 23—*Local Government Act*, 1888 (51 & 52 *Vict. c.* 41), *s.* 16—*Metropolitan Streets Act*, 1867 (30 & 31 *Vict. c.* 134), *s.* 23.

A by-law made by the London County Council provided that "no person shall frequent and use any street or other public place, on behalf either of himself or any other person, for the purpose of

LONDON—*continued.*
bookmaking, or betting, or wagering, or agreeing to bet or wager, with any person, or paying or receiving, or settling bets" :—

Held, that this by-law was within the power conferred by s. 23 of the Municipal Corporations Act, 1882 (applied to county councils by s. 16 of the Local Government Act, 1888), to make by-laws for the "good rule and government" of the county; that it was not repugnant to s. 23 of the Metropolitan Streets Act, 1867, and was reasonable, and therefore valid.

Decision of Kekewich J. affirmed.

White v. *Morley*, [1899] 2 Q. B. 34, and *Burnett* v. *Berry*, [1896] 1 Q. B. 641, approved.

Strickland v. *Hayes*, [1896] 1 Q. B. 290, and *Calder and Hebble Navigation Co.* v. *Pilling*, (1845) 14 M. & W. 76, distinguished. THOMAS *v.* SUTTERS - - - - **C. A. 10**

—— Buildings—Dangerous structures notice—Sanitary Works — Costs — Capital or income—Leasehold houses - **326**
See TENANT FOR LIFE AND REMAINDERMAN. 1.

—— Sewers—Cost of drainage works required by local authority—Liability of tenant —Covenant - - - - **128**
See LANDLORD AND TENANT. 2.

LOTS—Sale by auction—Solicitors' remuneration
See SOLICITOR. 2. **454**

LUNACY—*Contract by Lunatic to Purchase Real Estate—Voidable Contract—Completion of Purchase by Committee—Conversion.*

A person of unsound mind entered into a contract to purchase real estate; the purchaser was subsequently found by inquisition to be of unsound mind, and a committee of his estate was appointed.

The Master in Lunacy directed the committee to complete the purchase, and the purchase-money was provided out of the lunatic's personal estate. The lunatic having died intestate;—

Held, that the direction to the committee to complete the purchase amounted to an election by the Lunacy authorities to adopt the voidable contract entered into by the lunatic, and consequently that a conversion had been effected and the estate descended as realty. BALDWYN *v.* SMITH - - - - **Byrne J. 588**

2. —— *Foreign Domicil — Foreign Court — Declaration of Lunacy—Tuteur of Estate—Money in English Bank—Payment to Tuteur.*

Where there has been a foreign judicial declaration of the status of lunacy of a lunatic resident and domiciled abroad, and the tuteur of the estate appointed in pursuance of that declaration is entitled under the foreign law to take possession thereof, and to give valid discharges for all moneys, stocks, funds, and securities forming part thereof, an application by the lunatic and the tuteur for the transfer or payment of the lunatic's English property to the tuteur may be and generally ought to be granted, and that, whether the property is a trust fund under the control of the Court, or is merely a debt due to the estate.

In re Brown, [1895] 2 Ch. 666, and *In re De Linden*, [1897] 1 Ch. 453, followed.

Didisheim v. *London and Westminster Bank*, [1899] W. N. 107; 43 Sol. J. 642; 81 L. T. 108, distinguished.

Semble, the tuteur may apply in his own name without joining the lunatic. THIERY *v.* CHALMERS, GUTHRIE & Co. - - **Kekewich J. 80**

3. —— *Pauper Lunatic — Application of Property — Jurisdiction — Discretion — Person of Unsound Mind not so Found—Lunacy Act*, 1890 (53 & 54 *Vict. c.* 5), *s.* 299.

Sect. 299 of the Lunacy Act, 1890—which enables a justice to order the application to the expenses of maintenance of a lunatic chargeable to any union or local authority of any property of the lunatic more than sufficient to maintain his family, if any—does not affect the jurisdiction of the Court in Lunacy as to the application of the lunatic's property.

A man who was taken in charge as a wandering lunatic, and placed in a pauper lunatic asylum, had in his possession a sum of about 337*l.* His only other property was a 10*l.* share in a co-operative society and some furniture of small value. He had carried on business as a market gardener. He had not been found lunatic by inquisition. He was sixty-four years of age and his wife was sixty. He had a daughter aged twenty, who lived with her mother, and seven grown-up sons, who did not contribute to their mother's support :—

Held, that the discretion of the Court as to the application of the lunatic's property would be properly exercised by allowing out of the fund (the capital being used for the purpose) the sum of 26*l.* a year to the guardians as the cost of his maintenance in the asylum, and the sum of 25*l.* a year to the wife, and an order was made accordingly.

Per Vaughan Williams L.J : *Semble*, that after the making of the order the lunatic would no longer be in the position of a pauper lunatic. *In re* TYE - - - - **C. A. 249**

4. —— *Practice—Charging Order—Funds in Court—Administration.*

The rule of administration in Lunacy that the obligations of a lunatic are postponed to the needs of the lunatic does not affect funds in the High Court.

A judgment creditor of a lunatic obtained a charging order on funds of the lunatic in court. The balance only of the funds, after satisfying the charge, was transferred to Lunacy. *In re* BROWN. LLEWELLIN *v.* BROWN
Cozens-Hardy J. 489

MARRIAGE CONTRACT — Promise by wife's father to leave her "a share" of his estate—Specific performance - **331**
See HUSBAND AND WIFE. 1.

MARRIED WOMAN.
See HUSBAND AND WIFE.

MEETINGS — Notice — Service — Deceased "member"—Legal personal representatives - - - - **656**
See COMPANY. 1.

MEMORANDUM AND ARTICLES OF ASSOCIATION - - - 481, 656, 804
See COMPANY. 1, 6, 7.

METROPOLIS.
See LONDON.

MIDDLESEX REGISTRY—*Rectification of the Register—Land Registry (Middlesex Deeds) Act*, 1891 (54 & 55 *Vict. c.* 64), *s.* 1—*Land Transfer Act*, 1875 (38 & 39 *Vict. c.* 87), *s.* 95—*Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 7, *sub-s.* 2.

Where a Court of competent jurisdiction has decided that a person is entitled to land registered under the Middlesex Registry Acts, and as a consequence of the decision is of opinion that a rectification of the register is required, the Court may not only declare that the register ought, but may also order it, to be rectified. STEPHENSON *v.* YORKE - - - - **Buckley J. 505**

MINES—*Agreement for Lease of Undivided Moiety of Mineral Property—Specific Performance.*

The Court will decree specific performance of an agreement for a lease of an undivided moiety of mineral property.

Price v. *Griffith*, (1851) 1 D. M. & G. 80, discussed and explained. HEXTER *v.* PEARCE **Farwell J. 341**

—— Tenant for life—Lease of surface reserving minerals - - - - **90**
See SETTLED LAND. 2.

MISREPRESENTATION—Innocent misrepresentation of fact — Common mistake — Equitable right of donor to recover **354**
See VOLUNTARY GIFT.

MISTAKE — Conveyance — Written contract — Covenant for title—Rectification - Parol evidence - - - - **616**
See VENDOR AND PURCHASER. 4.

—— Innocent misrepresentation of fact—Common mistake—Equitable right of donor to recover - - - - **354**
See VOLUNTARY GIFT.

MORTGAGE — *Clog on Redemption* — "*Tied*" *Public-house.*

A mortgage of a leasehold public-house to a brewing company prohibited the mortgagor and persons deriving title under him from selling on the premises during the leasehold term malt liquors not purchased from the company.

The mortgagor was willing to pay off all the moneys secured on having a reconveyance or transfer free of the "tie" in respect of the sale of liquors:—

Held, that he was so entitled, as the "tie," though valid during the continuance of the security, could not be maintained when all moneys due upon the security had been paid off.

Biggs v. *Hoddinott*, [1898] 2 Ch. 307, and *Santley* v. *Wilde*, [1899] 2 Ch. 474, distinguished. RICE *v.* NOAKES & Co. - **Cozens-Hardy J. 213**

2. —— *Policy of Assurance — Surrender of Policy — Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 8—*Payment "in the meantime"—Payment by Mortgagor or his Agent.*

In 1871 A. mortgaged a contingent reversionary interest in certain property together with a policy of assurance on his own life for 2500*l.* for securing the sum of 2500*l.* The mortgage contained the usual covenants for payment of the principal and interest with power of sale and surrender of the policy.

A. never made any payment in respect of the principal or interest of the mortgage debt, nor paid any of the premiums on the policy, which was kept up by the mortgagee.

In 1893 the mortgagee surrendered the policy to the office for the sum of 1468*l.* 14*s.* A. had no notice of the surrender.

The mortgagee died in 1895 and A. died in 1899.

Held, in an action by the representative of the mortgagee against the representatives of A., claiming that the security might be enforced, that the receipt by the mortgagee of the surrender value of the policy was not a payment of principal or interest within the meaning of s. 8 of the Real Property Limitation Act, 1874, so as to entitle the plaintiff to recover on the covenant contained in the mortgage.

In re Conlan's Estate, (1892) 29 L. R. Ir. 199, discussed.

The words "in the meantime" in the section include a period between the time of the commencement of the action or suit and a time when the remedy for the debt would otherwise have been barred.

Harty v. *Davis*, (1850) 13 Ir. L. Rep. 23, approved. *In re* LORD CLIFDEN. ANNALY *v.* AGAR-ELLIS - - - **Byrne J. 774**

3. —— *Power of Sale—Action to Set Aside Sale —Laches.*

The mortgagee of a reversionary interest sold it under the power of sale in January, 1888. The reversioner had notice of the sale, and he then took legal advice as to his rights, but he took no steps to impeach the sale until December, 1897, when he commenced an action to set it aside. The reversion had fallen into possession in April, 1897:—

Held, that, by reason of his laches, the plaintiff could not maintain the action.

Decision of Cozens-Hardy J., [1899] 1 Ch. 873, affirmed. NUTT *v.* EASTON - - **C. A. 29**

4. —— *Transfer of Mortgage without Notice to Mortgagor—Sale of Mortgaged Property by Mortgagor and original Mortgagee as unincumbered—Payment of Mortgage Debt by Mortgagor to original Mortgagee—Omission to call for Title Deeds—Contructive Notice of Transfer.*

The owner of real estate mortgaged it in fee to his solicitor, who shortly afterwards transferred the mortgage to a client, the title deeds and the mortgage deed, on which the transfer was indorsed, being handed over to the transferee. The transferee omitted to give notice of the transfer to the mortgagor, and he was ignorant of it. Afterwards the property was sold and was conveyed as free from incumbrances by the mortgagor and the original mortgagee to the purchaser by a deed (prepared by the solicitor) which contained false recitals, the mortgage and the transfer of it being suppressed.

The purchase-money was received by the solicitor, who out of it retained the mortgage debt and interest, and paid over the balance to his client, the mortgagor. The purchaser had no notice of the mortgage. The mortgagor did not

MORTGAGE—*continued.*
call for the title deeds or the mortgage deed when the mortgage was paid off, but left everything to his solicitor, the original mortgagee, and signed what he told him to sign. The solicitor paid the interest on the mortgage debt to the transferee until he absconded, when the fraud was discovered. The purchaser then claimed to hold the property free from the mortgage:—

Held, by Cozens-Hardy J., that, as the mortgagor had been a party to the false recitals in the conveyance to the purchaser, and had not called for the title deeds when the mortgage debt was retained by the solicitor out of the purchase-money, he could not claim as against the transferee the benefit of the ordinary rule that payments made by a mortgagor to a mortgagee without notice of a transfer are good as against the transferee; and that the purchaser had no better equity against the transferee.

Semble, the negligence of a mortgagor, who is entitled on payment off of the mortgage to have the mortgage deed and the title deeds delivered to him and who omits to ask for them, is greater than the negligence of a transferee of the mortgage who omits to give notice of the transfer to the mortgagor.

Held, by the Court of Appeal, that, inasmuch as the evidence shewed the mortgagor had placed himself entirely in the hands of his solicitor, and constituted him his general agent in the transactions, the knowledge of the solicitor must be imputed to him, and he must be treated as having had notice of the transfer of the mortgage; and consequently the payment of the mortgage debt to the solicitor was not effectual as against the transferee, and the mortgage must be treated as still subsisting in her favour, and the purchaser must hold the property subject to it, but with a right to be indemnified against it by the mortgagor. DIXON *v.* WINCH - - **C. A. 736**

—— Mortgagee in possession—Specific devise by executor beneficially entitled to mortgage debt - - - - **801**
See WILL. 7.

—— Receiver - - - - - **788**
See DISTRESS.

—— Restrictive covenant—Tied public-house—Assigns—Under-lessee—Notice - **188**
See COVENANT. 2.

—— Undischarged bankrupt—Surplus assets—After-acquired property — Successive bankruptcies—Rights of trustees **822**
See BANKRUPTCY. 2.

MUNICIPAL CORPORATION—By-law—Validity—Betting—Streets - - **10**
See LONDON. 2.

MUSIC—Infringement of copyright—Mechanical organ—Musical directions for performance - - - - - **122**
See COPYRIGHT. 2.

NAME—Dissolution of partnership—Solicitors' business—Right to use of name of old firm - - - - - **551**
See PARTNERSHIP.

NAME AND ARMS CLAUSE—Use of surname
See WILL. 8. **96**

NOTICE—Forfeiture of lease—Breach of covenant—Notice bad in part - - **496**
See LANDLORD AND TENANT. 4.

—— Meetings—Service—Deceased "member"
See COMPANY. 1. **656**

—— Restrictive covenant—Tied public-house—Mortgagor and mortgagee—Assigns—Underlessee - - - **188**
See COVENANT. 2.

—— Secret trust—Absolute gift—Joint tenants
See WILL. 1. **237**

—— Transfer of mortgage without notice to mortgagor—Constructive notice of transfer - - - - - **736**
See MORTGAGE. 4.

NUISANCE—Conditions of sale—"Outgoings"—Notice by sanitary authority to abate nuisance - - - - **231**
See VENDOR AND PURCHASER. 3.

—— Highway—Obstruction—Loading and unloading of goods—Injunction - **276**
See HIGHWAY.

OBSTRUCTION—Highway—Loading and unloading of goods—Injunction - - **276**
See HIGHWAY.

ORGAN—Infringement of copyright—Mechanical organ—Musical directions for performance - - - - - **122**
See COPYRIGHT. 2.

"OUTGOINGS"—Conditions of sale—Notice by sanitary authority to abate nuisance **231**
See VENDOR AND PURCHASER. 3.

—— Drainage expenses—Improvements—Capital or income - - - - **319**
See TENANT FOR LIFE AND REMAINDERMAN. 2

—— Private street works—Apportionment of expenses—Vendor and purchaser—Implied covenant against incumbrances **683**
See LOCAL GOVERNMENT. 2.

—— Railway company—"Proper outgoings in respect of the undertaking" - **261**
See PRACTICE. 2.

PARTICULARS—Discovery — Inspection—Privilege - - - - - **376**
See PRACTICE 5.

PARTIES—Local authority—Powers—Practice
See LOCAL GOVERNMENT. 1. **51**

PARTITION—*Practice — Partition Action—Real Estate of Infant—Request—Order for Sale—Conversion—Carrying over Infant's share—Partition Act*, 1876 (39 & 40 *Vict. c.* 17), *s.* 6.

The judgment in a partition action, brought by an infant as sole plaintiff by his next friend, contained a request for sale by the plaintiff and other persons, defendants, claiming to be entitled to the entirety of the property, directed a sale, if the parties other than the infant plaintiff were found entitled to a moiety, and reserved liberty to apply for a sale if it should appear that the defendants were not so entitled; the master

PARTITION—*continued.*

having certified that the defendants were entitled to a moiety, the property was sold under the judgment without further order. The infant having died before the proceeds of sale were paid out of court:—

Held, that there had been no conversion of the infant's share, and that it must be dealt with as realty.

Semble, the law laid down by *Foster* v. *Foster*, (1875) 1 Ch. D. 588, still holds good, notwithstanding the Partition Act, 1876, s. 6, and the dicta of Jessel M.R. in *Wallace* v. *Greenwood*, (1880) 16 Ch. D. 362.

Where an infant by a next friend is one of several plaintiffs by counsel requesting a sale, and a sale is ordered upon this request, the proceeds of the infant's share ought to be earmarked as real estate.

Howard v. *Jalland*, [1891] W. N. 210, examined and approved, *In re* NORTON. NORTON *v.* NORTON - - - - Byrne J. 101

PARTNERSHIP—*Dissolution—Right to Use of Name of Old Firm—Solicitors' Business.*

Upon the dissolution of a partnership, without any sale or assignment of the goodwill of the business, and without any provision as to the use of the firm name, each of the partners is entitled to carry on business under that name, provided that he does not by so doing expose his former partners to any risk of liability.

Whether there will be any such risk is a matter to be determined having regard to the circumstances of each case.

In 1882 a partnership of solicitors was constituted, the partners being William Burchell the elder, William Burchell the younger, the defendant W. G. Wilde, and the plaintiffs, J. W. Burchell and C. T. D. Burchell, and they carried on business under the style of "Burchell & Co."

In June, 1893, William Burchell the elder having died and William Burchell the younger having retired, the plaintiffs and the defendant W. G. Wilde agreed to continue in partnership under the style of "Burchell & Co."

In the year 1899 the partnership was dissolved by consent, there being no sale of the goodwill or assets and no provision as to the use of the firm name.

The plaintiffs then proceeded to carry on business at the old office as "Burchells & Co.," and the defendant W. G. Wilde and his son (whom he had taken into partnership) at new offices as "Burchell & Co."

The plaintiffs claimed the exclusive right to use the name "Burchell" or "Burchells," and to restrain the defendants from using either of those names in any way as part of their firm name:—

Held, by Byrne J., on motion for an injunction, that the right to the injunction depended upon the plaintiffs' establishing that any use of the word "Burchell" as part of the name of the defendants' firm would expose the plaintiffs to risk of liability, and, the Court not being satisfied that either of the plaintiffs would be under any tangible risk of liability if the defendants were (as they said they were willing to do) to practise as "Burchell, Wilde & Co.," especially if the plaintiffs were to use a style carrying their

PARTNERSHIP—*continued.*

initials, or were to take the name of "Burchells & Burchell," made no order on the motion:

Held, by the Court of Appeal, that, subject to the above limitation, the defendants were entitled to use the name "Burchell & Co.," though it would be be more satisfactory if they would undertake to continue to use (as they had done since the hearing by Byrne J.) the name "Burchell, Wilde & Co."

Gray v. *Smith*, (1889) 43 Ch. D. 208, distinguished.

The case of *Banks* v. *Gibson*, (1865) 34 Beav. 566, must be read subject to the qualification that the use of the old name must not expose the other partners to liability. BURCHELL *v.* WILDE - - - - - C. A. 551

PATENT—*Infringement—Patented Articles bought in England and sent Abroad for Sale—"Making use of" the Invention—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *Sched. I., Form D—Measure of Damages.*

The defendants bought in England articles which infringed the plaintiff's patent, and sent them to their branch business house in Paris, where they were sold to various foreign purchasers:—

Held, that the transport of the articles within the United Kingdom under the circumstances was "making use" of the invention within the meaning of the patent, and constituted an infringement thereof.

The principles as to the assessment of damages discussed in *Pneumatic Tyre Co.* v. *Puncture Proof Pneumatic Tyre Co.*, (1899) 16 Rep. Pat. Cas. 209, applied. BRITISH MOTOR SYNDICATE, LIMITED *v.* TAYLOR & SON - Stirling J. 577

2. —— *Practice—Patent Action—Petition for Revocation—Liberty to apply for Leave to Amend by Disclaimer—Conditions to be Imposed—Form of Order—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 18, 19, 20.

The owners of a patent for a machine having brought an action for its infringement, the defendants presented a petition for its revocation. The plaintiffs then asked for liberty to apply at the Patent Office for leave to amend their specification by way of disclaimer:—

Held, that, under the special circumstances of the case, the Court, in giving the liberty asked for, ought to impose the condition (similar to that which was imposed by the House of Lords in *Deeley* v *Perkes*, [1896] A. C. 496, 500; 13 Rep. Pat. Cas. 581) that the plaintiffs should not bring or maintain any action for infringement of the patent in respect of any machines or parts of machines made prior to the date of the order.

In *Deeley* v. *Perkes* the House of Lords did not lay down any general practice as to the conditions to be imposed in such cases, but imposed that condition by reason of the peculiar circumstances of that case. LUDINGTON CIGARETTE MACHINE COMPANY *v.* BARON CIGARETTE MACHINE COMPANY. *In re* PITT'S PATENT, No. 9858 OF 1892 - - - - - C. A. 508

3. —— *Utility.*

A very small amount of utility is sufficient to support a patent. Utility, in patent law, does not mean abstract, or comparative, or competitive,

PATENT—*continued.*

or commercial utility; but, as applied to an invention, it means that the invention is better than the preceding knowledge of the trade as to a particular fabric, better that is in some respect though not necessarily in every respect. For instance, an invention is useful by which an article good, though not so good as one previously known, can be produced more cheaply by a different process. And an invention is useful when the public are thereby enabled to do something which they could not do before, or to do in a more advantageous manner something which they could do before—or in other words, an invention is patentable which offers the public a useful choice. WELSBACH INCANDESCENT GAS LIGHT COMPANY *v.* NEW INCANDESCENT (SUNLIGHT PATENT) GAS LIGHTING COMPANY
Buckley J. 843

PAUPER—Lunatic—Application of property—Jurisdiction—Discretion - - 249
See LUNACY. 3.

PAYMENT—To tuteur—Money in English bank—Foreign domicil—Foreign Court—Declaration of lunacy - - 80
See LUNACY. 2.

PAYMENT INTO COURT—Married woman administratrix—Attachment—Form of order - - - - - 180
See HUSBAND AND WIFE. 2.

PENALTY—Fine arts—Infringement—Principal and Agent - - - - 73
See COPYRIGHT. 1.

POLICY—Life insurance.
See INSURANCE, LIFE.

POLLUTION OF RIVERS—Prescriptive right of drainage—Trade effluents—Polluting liquid — - - - 781
See LOCAL GOVERNMENT. 3.

POOR LAW—*Guardians of the Poor—Persons entitled to Relief—"Sudden and urgent Necessity"—Able-bodied Men unwilling to Work—Strike of Workmen—"Idle and Disorderly Persons"—Prosecution by Guardians—Powers of Local Government Board—Jurisdiction of High Court—Injunction—Public Authority—Practice—Declaration of Right—Poor Relief Act*, 1601 (43 *Eliz. c.* 2), *s.* 1—*Vagrancy Act*, 1824 (5 *Geo.* 4, *c.* 83), *s.* 3—*Poor Law Amendment Act*, 1834 (4 *& 5 Will.* 4, *c.* 76), *ss.* 15, 52, 54—*Poor Law Audit Act*, 1848 (11 *& 12 Vict. c.* 91), *s.* 4—*Rules of Supreme Court*, 1883, *Order XXV., r.* 5.

The classes of persons who are entitled to poor law relief are still (notwithstanding subsequent legislation) the same as those mentioned in s. 1 of the Act of 43 Eliz. c. 2.

Able-bodied men who can, if they choose, obtain work which will enable them to maintain themselves, their wives and families, but who, by reason of a strike or otherwise, refuse to accept that work, are not entitled to relief, except that, if they become physically incapable of working, the guardians may, to prevent their starving, give them temporary relief. But in that case the guardians ought to prosecute them under the Vagrancy Act, 1824, s. 3, as "idle and disorderly persons."

POOR LAW—*continued.*

The wives and children of such men, however, are entitled to relief, though they themselves are not.

Semble also, that men who are prevented from accepting work by fear of physical violence are entitled to relief.

A general strike of workmen does not of itself create a case of "sudden and urgent necessity" within the meaning of s. 54 of the Poor Law Amendment Act, 1834.

The High Court has jurisdiction to restrain guardians from applying the poor-rates improperly.

But this jurisdiction does not interfere with the power of the Local Government Board under s. 4 of the Poor Law Audit Act, 1848, to remit improper payments by guardians which have been disallowed by the auditor.

The plaintiffs claimed an injunction to restrain the defendants from applying the rates in the relief of able-bodied men who could have obtained work, but who refused to accept it, and also a declaration of the illegality of such an application of the rates. At the trial of the action the plaintiffs did not ask for an injunction:—

Held, that the Court had jurisdiction, and ought to make a declaration that any payment out of the rates for setting to work or for the relief of able-bodied men who could at the time obtain and perform work at wages sufficient to support themselves and their wives and families (if any) was unlawful and ought to be disallowed by the auditor of the guardians' accounts.

But the declaration was not to include relief given to or for the wives and children of such men, and was in no way to affect the power of the Local Government Board to remit such disallowed payments, although unlawfully made, under any statute enabling them to do so.

Decision of Romer J. reversed. ATTORNEY-GENERAL *v.* MERTHYR TYDFIL UNION C. A. 516

POST—Acceptance by—Withdrawal of offer before acceptance—Company—Shares
See CONTRACT. 220

POWER—*Appointment—Exercise by Will—Foreign Domicil of Testatrix—Capacity to Dispose of Property.*

A domiciled Frenchwoman having, under an English settlement, a special power of appointment by will over funds in England, can exercise the power in such a way as to dispose of the property in a manner inconsistent with her position under the law of France. The exercise of such a power is not a disposition of property belonging to the testatrix. POUEY *v.* HORDERN
Farwell J. 492

2. —— *Appointment—Extent of Exercise—Power to appoint Invested Fund—Appointment of Specified Sums of Cash—Increase in Value of Investments.*

A father by his will gave to trustees a sum of 30,000*l.* (to be invested as he directed), upon trust to pay the interest and annual proceeds thereof to his daughter during her life, and after her death the same sum, together with the interest and annual proceeds thereof, was to be held on such trusts as the daughter should appoint in

POWER—*continued.*

favour of her children or grandchildren, with a trust over in default of appointment.

The daughter by her will recited verbatim the gift in the father's will, and then, in exercise of the power, appointed that "the said sum of 30,000*l.*, together with the interest and the annual proceeds thereof, by the said will of my father to be held in trust for me, my children and grandchildren, and over which I have such power of appointment as aforesaid," should after her death be held by the trustees of her father's will upon trust as to 1000*l.* "part thereof" for her daughter Emmeline; upon trust as to five sums of 1000*l.*, 4000*l.*, 6000*l.*, 6000*l.*, and 6000*l.* respectively, each of which was described as "other part of the said sum of 30,000*l.*," on trust for five others of her children respectively, and upon trust as to another sum of 6000*l.*, which was described as "the residue of the said sum of 30,000*l.*," for her other child. At the time of her death the securities on which the 30,000*l.* had been invested were worth 39,000*l.*:—

Held, by Kekewich J., that only the sum of 30,000*l.* was effectually appointed by the will, and that the excess of 9000*l.* must go as in default of appointment.

Held, by the Court of Appeal, that the testatrix was dealing with the fund as an invested fund, and that the whole of it was appointed in the proportions indicated by her will. *In re* CRUDDAS. CRUDDAS *v.* SMITH - - - C. A. 730

3. —— *Conflict of Laws—Power of Appointment—Personal Property—Execution—Domiciled Foreigner—Unattested Will—Validity—Construction—Administration with Will annexed—Wills Act*, 1837 (1 *Vict. c.* 26), *ss.* 9, 10, 27—*Lord Kingsdown's Act* (24 & 25 *Vict. c.* 114), *s.* 1.

A will of a domiciled foreigner, which is valid by the law of the testator's domicil and has been recognised as a valid will in this country by the Probate Division, is capable of operating as an execution of a power of appointment by will over personal estate under an English instrument, although the formalities required by ss. 9 and 10 of the Wills Act have not been observed.

D'Huart v. *Harkness*, (1865) 34 Beav. 324, followed and approved.

In re Kirwan's Trusts, (1883) 25 Ch. D. 373, and *Hummel* v. *Hummel*, [1898] 1 Ch. 642, distinguished, on the ground that they apply only to wills which owe their validity to Lord Kingsdown's Act (24 & 25 Vict. c. 114).

Although as a general rule a will is to be construed according to the law of the testator's domicil, this rule does not apply where there are indications on the face of the will that the testator wrote it with reference to the law of some other country.

A domiciled French subject, having a general power of appointment over a fund under an English instrument, left all her property to her husband by a holograph will made in French form and unattested. The will was valid by the law of France, and letters of administration with the will annexed were granted in this country. The will contained indications that it was intended to take effect in England as well as in France:—

POWER—*continued.*

Held, (1.) that it was competent for the testatrix to execute the power by a will in this form, notwithstanding ss. 9 and 10 of the Wills Act; (2.) that the same rules of construction ought to be applied to it as would be applied to an English will in the same terms and of the same date, including the rule of construction introduced by s. 27 of the Wills Act.

Held, therefore, that the general bequest operated as a valid execution of the power in favour of the husband. *In re* PRICE. TOMLIN *v.* LATTER - - - Stirling J. 442

4. —— *Execution — Limited Power — Joint Donees—Conveyance by one Donee and Persons entitled in Default—Concurrence of other Donee—Respective Estates and Interests—No Reference to Power—Power in Defeasance—Implied Release.*

Any dealing with an estate by the donee of a power inconsistent with the exercise of that power releases it.

A husband and wife had a joint power, and subject thereto the survivor had a separate power, to appoint property among certain objects. The husband and wife and the persons entitled in default of appointment executed a deed whereby the wife (with her husband's consent) and those persons according to their several and respective estates and interests as beneficial owners assigned the property to an object. The joint power was not referred to. The wife died, and the husband appointed the property to other objects:—

Held, that, whether or not the deed of assignment operated as a joint appointment, and (*semble*) it did so operate, it released the husband's separate power, and his subsequent appointment was inoperative.

In re Hancock, [1896] 2 Ch. 173, applied. FOAKES *v.* JACKSON - - Farwell J. 807

—— Appointment — Administration — Order in which funds applied in payment of debts - - - - - 152
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See MORTGAGE. 3.

PRACTICE—*Charging Order—Judgment Debtor—Death of Judgment Debtor—Leave to issue Execution against Executor—Clerical Error—Correction—Charge on Executor's Interest—Judgments Act*, 1838 (1 & 2 *Vict. c.* 110), *ss.* 14, 15—*Rules of Supreme Court, Order XXVIII., r.* 11; *Order XLII., r.* 23; *Order XLVI., r.* 1.

Under 1 & 2 Vict. c. 110, s. 14, there is no power after the death of a judgment debtor to make a charging order against his executor in respect of a judgment debt of the deceased, unless in some way judgment has been first obtained against the executor.

Whether such a judgment can be obtained under the present practice, *quære.*

Under s. 15 of the Act it is essential that the person who is to shew cause against the making absolute a charging order nisi should be the person against whom the judgment was recovered.

The executor of a deceased judgment debtor cannot shew cause against a charging order nisi

made in respect of a judgment recovered against the deceased.

Leave given under rule 23 of Order XLII. to issue execution against the executor of a deceased judgment debtor does not operate as a judgment against the executor; it dispenses with the necessity of recovering judgment against him, and consequently does not satisfy the requirements of ss. 14 and 15 of 1 & 2 Vict. c. 110:—

So *held* by the Court of Appeal.

Haly v. *Barry*, (1868) L. R. 3 Ch. 452, and *Finney* v. *Hinde*, (1879) 4 Q. B. D. 102, commented on.

An order obtained by a judgment creditor after the death of the judgment debtor gave him liberty to issue execution against the debtor's executor, and ordered that, unless sufficient cause were shewn to the contrary, the interest of the debtor in a sum of Consols should stand charged with the amount of the judgment. Before the order was made absolute judgment was pronounced for the administration of the debtor's estate:—

Held, by Stirling J., that the order could not be treated as charging the interest of the executor, and that, having regard to the judgment for administration, the Court ought not to correct the form of the order:

Held, therefore, that the order was bad.

Decision affirmed by the C. A. on different grounds.

Observations by Stirling J. on the construction of orders of the Court. STEWART *v.* RHODES
C. A. 386

2. —— *Costs—Railway Company — Receivership Order—"Proper Outgoings in respect of the Undertaking"—Costs of Defending an Action in respect of the Undertaking—Costs of Proceedings under Act of Parliament containing no Provision for Costs—Jurisdiction—Railway Companies Act*, 1867 (30 & 31 *Vict. c.* 127), *s.* 4—*Supreme Court of Judicature Act*, 1890 (53 & 54 *Vict. c.* 44), *s.* 5.

An order was made under s. 4 of the Railway Companies Act, 1867, upon the application of a judgment creditor, appointing a receiver and manager of the undertaking of a railway company, and directing the usual inquiries as to the debts of the company and the rights and priorities of the creditors. At the date of this order there was pending an action by the contractor of the line against the company for his remuneration. Subsequently an order was obtained by the contractor giving him liberty, notwithstanding the receivership order, to proceed with the action, and giving the company liberty (according to the construction placed by the Court upon the order) to defend the action on behalf of all persons interested in the assets of the company. The action resulted in a substantial reduction of the contractor's claim, and each party was ordered to pay his own costs:—

Held, (1.) that the costs of defending the action were not "proper outgoings in respect of the undertaking" within s. 4 of the Railway Companies Act, 1867; (2.) that, notwithstanding the absence of any mention of costs in the Act, the Court had jurisdiction to order payment of

the costs of proceedings thereunder; (3.) that the costs of defending the action incurred since the date of the receivership order ought to be treated as incurred in prosecuting the inquiries directed by that order, and were incurred for the benefit of the debenture-holders and other creditors of the company, and ought to be paid out of the moneys in the hands of the receiver and manager in priority to their claims.

Order of Byrne J. varied. *In re* WREXHAM, MOLD AND CONNAH'S QUAY RAILWAY COMPANY
C. A. 261

3. —— *Costs—Security for—Foreigner resident Abroad—General Inquiry—Claimant to Fund in Court—Person in Position of Plaintiff.*

As a general rule a claimant under a general inquiry cannot be required to give security for costs.

Where a solicitor was ordered to pay into court a fund in his hands belonging to a client subject to the claims of certain alleged incumbrancers thereon, and an inquiry was directed who was entitled thereto, a foreign claimant resident out of the jurisdiction was ordered to give security for costs upon the ground that, in the special circumstances of the case, the inquiry was equivalent to an interpleader issue in which the claimant was in the position of a plaintiff. *In re* MILWARD & Co. - - - C. A. 405

4. —— *Discovery — Company — Winding-up —Production of Documents—Discretion of Judge —Officer of Government Department—Companies Act*, 1862 (25 & 26 *Vict. c.* 89), *s.* 115.

Under s. 115 of the Companies Act, 1862, the judge has a discretion as to making an order for the production of documents, and the Court of Appeal will not readily interfere with the exercise of his discretion, though it has jurisdiction to do so in a proper case.

The liquidator of a company, in order to obtain evidence in support of a misfeasance summons which he had issued against the directors of the company and the auditors, applied under s. 115 for an order that the surveyor of taxes should attend for examination and produce some balance-sheets of the company which had been delivered to him for the purpose of assessment of income tax. The surveyor objected to produce these documents, and the Board of Inland Revenue supported his objection by a resolution that their production would be "prejudicial and injurious to the public interests and service":—

Held, by Wright J., that an order for production ought not to be made under s. 115:

Held, by the Court of Appeal, that the exercise by the judge of his discretion ought not to be interfered with.

Per Romer L.J.: The question for decision was not necessarily the same as that which might arise on the hearing of the misfeasance summons with regard to a subpœna for the production of the documents in question.

Per Wright J.: It is not in every case essential that the principal officer of a Government department should himself attend in court to take such an objection to the production of documents in the possession of the department. In many cases the Court will be satisfied of the

PRACTICE—*continued.*
validity of the objection by other evidence—e.g., by the affidavit of a responsible officer. *In re* JOSEPH HARGREAVES, LIMITED - C. A. 347

5. —— *Particulars—Discovery—Production—Inspection—Privilege—Rules of Supreme Court, Order XIX., rr.* 6, 7; *Order XXXI., rr.* 15, 19A (2).

A defendant may be ordered to give particulars of documents referred to in his pleading, even though he has in an affidavit of documents effectually claimed for those documents privilege from production.

The right to particulars and the right to production are distinct and independent rights.

The plaintiff claimed a declaration that she was entitled (subject to incumbrances) in fee simple to an estate of which the defendant was in possession, and her title to which he denied.

By his defence the defendant said (paragraph 3) that the mortgagees had, in the valid exercise of their statutory power of sale, sold and conveyed the estate to him for valuable consideration, and that he purchased the same in good faith and without notice of any claim which the plaintiff might have had to the estate in priority to the title of the mortgagees, and the defendant relied on his title as such bonâ fide purchaser, and he said (paragraph 4) that he had remortgaged the property so purchased by him to the same mortgagees, and that the action could not be maintained in their absence.

The defendant made an affidavit of documents by which he sufficiently claimed protection from production for a bundle of documents which included the deeds by which the transactions referred to in paragraphs 3 and 4 of the defence had been carried out:—

Held, that, notwithstanding this claim to protection, the defendant must give particulars of those transactions—namely, the date of the sale and conveyance to him by the mortgagees, and what was the valuable consideration for the same; the date of the mortgage by him, and for how much it was given.

Decision of Kekewich J. reversed. MILBANK *v.* MILBANK - - - - C. A. 376

6. —— *Undertaking to do an Act—Breach—Committal or Attachment—Service of Order containing the Undertaking—Solicitor—Rules of Supreme Court*, 1883, *Order XLII., r.* 7; *Order XLIV., rr.* 1, 2.

On a motion for liberty to issue a writ of attachment against solicitors for breach of an undertaking, given by them and embodied in an order of the Court, it appeared that the order had not been served upon them:—

Held, that service of the order was not necessary; but that undertakings, whether positive or negative, must be enforced by committal and not by attachment. D. *v.* A. & Co Cozens-Hardy J. 484

—— Attachment—Married woman administratrix—Payment into court—Form of order - - - - - 180
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PRINCIPAL AND AGENT—*Warrant of Authority—Solicitor—Authority to Defend Action in Name of Company—Revocation of Authority—Notice of Revocation—Payment by Defendant's Solicitor of Plaintiff's Costs of Abortive Action—Company—Dissolution pendente lite—Judgment against Dissolved Company—Jurisdiction.*

A solicitor had originally authority to defend an action in the name of a company, but his authority was revoked by the dissolution of the company shortly before the trial. The trial of the action was delayed owing partly to the state of the business of the Court and partly to the pleadings being amended. The action was tried on the assumption that the company was in existence, and judgment was given for the plaintiff. Neither the solicitor nor the plaintiff knew till after the trial that the company had been dissolved; but on the day of the trial the solicitor was informed that the company had held its final meeting, and he took no steps to ascertain whether or not it had been dissolved. Upon motion by the plaintiff that the solicitor might be ordered to pay his costs of the action as from the date of the dissolution of the company:—

Held, (1.) (distinguishing *Whiteley Exerciser, Limited* v. *Gamage*, [1898] 2 Ch. 405) that the judgment was invalid against the company for want of jurisdiction; (2.) that the solicitor having originally authority to represent the company was not liable for acting on that authority after it had been revoked by the dissolution of the company until he knew or, by the exercise of due diligence, might have known of the dissolution; (3.) that on the day of the trial the solicitor did not use due diligence in ascertaining whether or not the company had been dissolved, and that he ought to pay the plaintiff's costs of the action after that date as between solicitor and client.

The principle of *Smout* v. *Ilbery*, (1842) 10 M. & W. 1, applies to a solicitor representing a party in an action, and it applies to a revocation of authority by the dissolution of a company as well as by the death of an individual. SALTON *v.* NEW BEESTON CYCLE COMPANY Stirling J. 43

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REVENUE—*Estate Duty—Incidence—Settlement Estate Duty—Settlement by Deed inter vivos—Covenant by Testator for Payment of a Specified Sum to Trustees of Settlement after his Death "without any deduction"—Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *ss.* 1, 2, 5, 6 *sub-s.* 2; *s.* 8, *sub-ss.* 3, 4; *ss.* 9, 14 *sub-s.* 1—*Finance Act*, 1896 (59 & 60 *Vict. c.* 28), *s.* 19.

A father on the marriage of his daughter covenanted with the trustees of her marriage settlement that his executors should within six months after his death pay to them the sum of 25,000*l.* "without any deduction," to be held by them upon the trusts of the settlement.

By his will the father devised lands to trustees for the term of 2000 years, upon trust to raise thereout and to pay to the trustees of the settlement the 25,000*l.*, with interest from his death.

On the death of the testator the Crown claimed, under s. 5 of the Finance Act, 1894, the payment of settlement estate duty in respect of the 25,000*l.*:—

Held, that, independently of the words "without any deduction" in the covenant, the settlement estate duty must have been paid out of the 25,000*l.* and not out of the testator's residuary estate.

REVENUE—*continued.*

But, *held*, that, by reason of those words, the settlement estate duty must be paid out of the residuary estate, or that if the 25,000*l.* was raised by the trustees of the term they must raise also the settlement estate duty in respect of the 25,000*l.*

Decision of Kekewich J., [1899] 2 Ch. 489, on the latter point reversed.

In re Webber, [1896] 1 Ch. 914, disapproved. *In re* MARYON-WILSON. WILSON *v.* MARYON-WILSON - - - - - C. A. 565

2. —— *Stamps — Undertaking — Solicitor — Practice—Stamp Act*, 1891 (54 & 55 *Vict. c.* 39), *s.* 14.

On motions, which were acceded to by the Court, an undertaking was given at the bar by counsel for the respondents, a company, on the instructions of their solicitors, that unstamped documents tendered in evidence on behalf of the respondents should be duly stamped, which undertaking was not fulfilled.

The Court directed the order made on the motions to be drawn up without entering the unstamped documents, and made a four-day order on the solicitors to produce the documents to the registrar duly stamped. *In re* COOLGARDIE GOLDFIELDS, LIMITED. *In re* CANNON, SON & MORTEN (SOLICITORS) - - Cozens-Hardy J. 475

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—— Sale by liquidator of undertaking of company—Fiduciary relation—Interest on profits - - - - 167
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SETTLED LAND — *Improvements — Prospective Order—Tenant for Life—Capital Money—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *s.* 21 (*iii.*); *s.* 22, *sub-ss.* 1, 2, 7; *ss.* 25, 26, 53.

Trustees for the purposes of the Settled Land Acts may approve a scheme for improvements submitted to them by a tenant for life, before they have capital money in hand and available for the proposed expenditure; when a scheme has been approved under these circumstances, and the improvements have been executed and paid for by the tenant for life "bonâ fide" with the knowledge of the trustees for the purposes of and in accordance with the approved scheme,

SETTLED LAND—*continued.*
early expenditure being for the benefit of all parties interested, in anticipation of moneys becoming afterwards available for the purposes of the approved scheme, the trustees are entitled, either with or without the approval of the Court, to reimburse the tenant for life the money so expended.

In re Millard's Settled Estates, [1893] 3 Ch. 116, distinguished. *In re* DUKE OF NORFOLK'S PARLIAMENTARY ESTATES. DUKE OF NORFOLK *v.* LORD HERRIES - - - **Byrne J. 461**

2. —— *Lease of Surface reserving Minerals—Tenant for Life—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 6-13, 17, 20.

The Settled Land Act, 1882, does not enable a tenant for life to lease the surface, reserving the minerals. *In re* NEWELL AND NEVILL'S CONTRACT - - - **Kekewich J. 90**

SETTLEMENT—*Voluntary Settlement by Young Lady only just of Age—Rescission—Undue Influence—Fiduciary Relationship—Independent Advice—Power of Revocation—Duty of Solicitor—Costs.*

Where a young person is minded to make a voluntary settlement in favour of a parent, it is not enough that he should have independent advice unless he acts on that advice: it is the duty of a solicitor independently advising an intending settlor to protect him against himself, and not merely against the personal influence of the donee in the particular transaction; and if his advice is not accepted he should decline to act further for the intending settlor.

In every voluntary settlement of this kind a power of revocation should be inserted.

Voluntary settlement by a young lady just of age set aside with costs against the relation in whose favour it was made and by whose undue influence it had been executed: trustee, being the solicitor who had drawn the settlement, disallowed his costs of the action in which the settlement was set aside. POWELL *v.* POWELL **Farwell J. 243**

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—— Prescriptive right of drainage—Trade effluents—Polluting liquid - 781
See LOCAL GOVERNMENT. 3.

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SHERIFF—Elegit—Duty to file writ and inquisition - - - - 296
See JUDGMENT.

SMOKE—Covenant for quiet enjoyment—Breach by erection of buildings causing lessee's chimneys to smoke - - 642
See LANDLORD AND TENANT. 3.

SOLICITOR — *Costs — Taxation at Instance of Cestui que Trust—Bill paid by Trustees more than Twelve Months previously—Solicitors Act*, 1843 (6 & 7 *Vict. c.* 73), *ss.* 37-41.

Sect. 39 of the Solicitors Act, 1843, ought to

SOLICITOR—*continued.*

be read and construed, as a separate and parenthetical enactment, independently of s. 41 of that Act; and, accordingly, taxation upon the application of a cestui que trust of a bill of costs paid by the trustees may be ordered under s. 39, notwithstanding that the application is not made within twelve calendar months after payment, as provided for by s. 41. *In re* WELLBORNE
Kekewich J. 857

2. —— *Remuneration — Sale by Auction in Lots—Freehold Property held under one Title—Separate Purchasers — Deducing Title — Scale Charge—"Transactions" under* 100*l.—Minimum Fee—Solicitors' Remuneration Act*, 1881 (44 & 45 *Vict. c.* 44)—*General Order, Sched. I., Part I., rr.* 1, 7, 8.

On a sale by auction in lots of property held under one title, each sale of one or more lots to a different purchaser forms a separate transaction within the meaning of rule 8 of the rules annexed to Sched. I., Part I., of the General Order under the Solicitors' Remuneration Act, 1881; so that where the scale charge for deducing title on any of the lots sold to different purchasers does not amount to 5*l.*, the solicitor is entitled to charge the minimum fee prescribed by rule 8 in respect of each separate sale. *In re* THOMAS. EVANS *v.* GRIFFITHS - - - Stirling J. 454

—— Authority to defend action in name of company—Dissolution pendente lite—Costs - - - - 43
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—— Costs—Voluntary settlement—Revocation—Undue influence—Independent advice—Duty of solicitor - - 243
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—— Dissolution of partnership—Right to use of name of old firm - - - 551
See PARTNERSHIP.

—— Undertaking — Breach — Committal or attachment—Service of order containing the undertaking - - - 484
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5 Geo. 4, c. 83, s. 3—*Vagrancy* - - 516
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2 & 3 Will. 4, c. 71, s. 2—*Prescription* - 592
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3 & 4 Will. 4, c. 27, s. 3—*Real Property Limitation* - - - - - 19
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3 & 4 Will. 4, c. 42, s. 3—*Civil Procedure* 718
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4 & 5 Will. 4, c. 76, ss. 15, 52, 54—*Poor Law*
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6 & 7 Vict. c. 73, ss. 37–41—*Solicitor* - 857
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11 & 12 Vict. c. 91, s. 4—*Poor Law Audit* 516
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18 & 19 Vict. c. 120, s. 85—*Metropolis Management* - - - - - 128
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24 & 25 Vict. c. 114, s. 1—*Wills* - - 442
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25 & 26 Vict. c. 68, s. 6—*Fine Arts Copyright*
See COPYRIGHT. 1. 73

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25 & 26 Vict. c. 102, s. 61—*Metropolis Management* - - - - - 695
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30 & 31 Vict. c. 127, s. 4—*Railway Companies*
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44 & 45 Vict. c. 44, General Order, Sched. I., Part I., rr. 1, 7, 8—*Solicitors' Remuneration* - - - - - 454
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57 & 58 Vict. c. clxvi., ss. 9, 10—*West Riding of Yorkshire Rivers* - - 781
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—— —— s. 7, sub-s. 2 - - - 505
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61 & 62 Vict. c. 26, s. 1—*Companies* - 804
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STOCKBROKER—*Continuation Account—Death of Principal—Contracts for Sale and Repurchase after Death—Liability of Stockbroker for Loss.*
Where a stockbroker having a continuation account with a client, on the death of the client, instead of closing the account immediately, upon his own authority enters into a fresh continuation and ultimately effects a sale of the securities at a loss, he is liable for the loss so incurred. *In re* OVERWEG. HAAS *v.* DURANT **Byrne J. 209**

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—— Charge of expenses on frontager's premises—Date from which charge takes effect—Vendor and purchaser—"Outgoings"
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STRIKE—Workmen—Guardians of poor—Jurisdiction—Persons entitled to relief 516
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SUBROGATION—Trustee carrying on business—Tort—Damages against trustee—Right to indemnity - - - 199
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SURFACE—Tenant for life—Lease of surface reserving minerals - - - 90
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SURNAME—Use of—Name and arms clause 96
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SURPLUS—Gift in trust—Beneficial gift or resulting trust - - - - 84
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—— Mortgage by undischarged bankrupt—After-acquired property—Successive bankruptcies—Rights of trustees 822
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—— Costs—Higher and lower scales—Matter in question under amount of 300*l.* - 573
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TENANT FOR LIFE AND REMAINDERMAN—*Capital or Income—Leasehold Houses—Equitable Tenant for Life—Repairs—Ground-rent—Cost of Sanitary Works—Public Health (London) Act*, 1891 (54 & 55 *Vict. c.* 76)—*Dangerous Structures Notice—London Building Act*, 1894 (57 & 58 *Vict. c. ccxiii.*).
There is no distinction in the position of an equitable tenant for life of leaseholds where the property is sub-let at a rack-rent, and where it is sub-let at an improved ground-rent; as between tenant for life and remainderman the cost of complying with a sanitary notice under the Public Health (London) Act, 1891, and a dangerous structures notice under the London Building Act, 1894, is chargeable against income. *In re* COPLAND'S SETTLEMENT. JOHNS *v.* CARDEN **Byrne J. 326**

2. —— *Capital or Income—Leasehold Houses—Outgoings—Drainage Expenses—Improvements—Capital Money—Conflict between Settlement and Act—Settled Land Act*, 1882 (45 & 46 *Vict. c.* 38), *ss.* 25, 51, 56—*Settled Land Act*, 1890 (53 & 54 *Vict. c.* 69), *ss.* 13, 15.
The cost of reconstructing the drainage of leasehold houses, forming part of a residuary estate bequeathed to trustees upon trust for tenant for life and remaindermen:—
Held, to be payable out of capital money, as an improvement within the meaning of the Settled Land Acts, notwithstanding a direction in the will that pending a sale the rents, after payment of "all incidental expenses and outgoings," were to be paid to the tenant for life. *In re* THOMAS. WEATHERALL *v.* THOMAS **Byrne J. 319**

3. —— *Leaseholds—Waste.*
A tenant for life of leaseholds is not liable to the remainderman for permissive waste.
The estate of a tenant for life of leaseholds *held* not liable to the remainderman for repairs made necessary by the non-fulfilment, during the life tenancy, of covenants to repair. *In re* PARRY AND HOPKIN - - **North J. 160**

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—— Lease of surface reserving minerals - 90
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TESTIMONIALS — Improper use of — Trade rivalry—Fraud — Interlocutory Injunction - - - - - 1
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TIME—Bills of sale—"stipulated time of payment" - - - - 142
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TITLE—Land transfer — Conveyance — Concurrence of all executors - - 58
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—— Sale under order of Court—Protection of purchaser - - - - 370
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TITLE DEEDS—Middlesex deeds—Rectification of register - - - - 505
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—— Omission to call for title deeds—Mortgage—Constructive notice of transfer 736
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TORT—Trustee carrying on business—Damages against trustee—Right to indemnity—Subrogation - - - - 199
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—— Wife's tort—Contract—Liability of husband - - - - - 203
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TRADE—Covenant—Lessee not entitled to enforce covenant as to user between lessee of adjoining land and lessor - 66
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—— Rivalry—Fraud—Improper use of testimonials—Interlocutory injunction 1
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TRADE-MARK—"*Addition*"—*Label*—*Distinctive Words common to the Trade—Disclaimer—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 64, 74.

On the registration, under the Patents, Designs, and Trade Marks Act, 1883, of a trade-mark consisting of a label, which contains as an essential part of it, not as an "addition" to it, words which are primâ facie distinctive, but are common to the trade, s. 74 does not apply, and the right to the exclusive use of those words need not be disclaimed by the owner of the mark. *In re* CLÉMENT & CIE.'S TRADE-MARK C. A. 114

2. —— *Infringement, Action for—Motion to Rectify—Trade-mark registered more than Five Years—Certificate of Right to Exclusive Use—*"*Action*"*—Patents, Designs, and Trade Marks Act*, 1883 (46 & 47 *Vict. c.* 57), *ss.* 76, 77A, 90—*Patents, Designs, and Trade Marks Act*, 1888 (51 & 52 *Vict. c.* 50), *s.* 18.

The proprietors of a trade-mark, which had been registered for more than five years, brought an action for infringement, and the defendants moved to rectify the register by removing the plaintiffs' mark therefrom. The action and motion were tried together and on the same evidence; an injunction was granted, and the motion was refused:—

Held, that, although after the expiration of five years from the date of registration the validity of the trade-mark could only be impeached on motion under s. 90 of the Patents, Designs, and Trade Marks Act, 1883, the right to the exclusive use of the trade-mark had come in question in the action within the meaning of s. 77A, and that the plaintiffs were entitled to a certificate to that effect. J. C. & J. FIELD & Co. *v.* WAGEL SYNDICATE, LIMITED. *In re* TRADE-MARK 96,997 Buckley J. 651

TRANSFER—Of mortgage without notice to mortgagor—Omission to call for title deeds—Constructive notice of transfer
See MORTGAGE. 4. 736

TRUST—Failure of—Repair of road—Road transferred to local authority - - 31
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TRUST—*continued.*

—— Resulting trust—Beneficial gift or—Surplus - - - - - 84
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—— Secret trust—Notice—Absolute gift—Joint tenants - - - - 237
See WILL. 1.

TRUSTEE—*Indemnity—Administration—Trustee carrying on Business—Tort—Damages against Trustee—Right of Trustee to Indemnity—Subrogation.*

A trustee carried on his testator's colliery business, and in so doing let down the surface of the land and injured the buildings of an adjoining owner, who recovered damages against the trustee personally for 1092*l.* and costs. The adjoining owner then claimed to be entitled to be paid direct out of the testator's estate the amount so recovered:—

Held, following *Benett* v. *Wyndham*, (1862) 4 D. F. & J. 259, that, as the injury had been occasioned by the trustee in the reasonable management and working of his testator's estate, he was entitled to be indemnified out of the assets, and, consequently, that the adjoining owner was entitled to stand in the place of the trustee and to claim the benefit of this right to indemnity so as to obtain payment of the damages and costs so recovered direct out of the testator's estate. *In re* RAYBOULD. RAYBOULD *v.* TURNER Byrne J. 199

—— Accounts—Misconduct of trustee—Common accounts refused at the trial - 225
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—— Fiduciary relation—Setting aside sale—Interest on profits - - - 167
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TUTEUR—Payment to—Money in English bank—Foreign domicil—Foreign Court—Declaration of lunacy - - 80
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ULTRA VIRES—Articles of association—Reconstruction—Shares in purchasing company—Rights of dissentient members
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UNDERLESSEE—Restrictive covenant—Tied public-house—Mortgagor and mortgagee—Assigns—Notice - - - 188
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UNDERTAKING—Breach—Committal or attachment—Service of order containing the undertaking—Solicitor - - 484
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UNDIVIDED MOIETY—Agreement for lease of—Mineral property—Specific performance
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UNDUE INFLUENCE—Fiduciary relationship—Voluntary settlement—Revocation—Independent advice—Duty of solicitor—Costs - - - - - 243
See SETTLEMENT.

USER—Covenant against trading — Lessee not entitled to enforce covenant as to user between lessee of adjoining land and lessor - - - - - 66
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UTILITY—Patent - - - - 843
See PATENT. 3.

VAGRANCY—Guardians of poor—Jurisdiction—Strike of workmen—Persons entitled to relief - - - - 516
See POOR LAW.

VENDOR AND PURCHASER—*Abstract—Leaseholds—Assignment — Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 3, *sub-s.* 6.

Every document that forms a link in the vendor's title ought to be abstracted in chief.

Sect. 3, sub-s. 6, of the Conveyancing and Law of Property Act, 1881, presupposes a proper abstract, and does not apply to a document in the chain of title.

In an abstract of title to leaseholds, an assignment appeared only by way of recital in another document:—

Held, that an abstract of the recited assignment must be delivered at the vendor's expense.

In re Ebsworth and Tidy's Contract, (1889) 42 Ch. D. 23, considered. *In re* STAMFORD, SPALDING AND BOSTON BANKING COMPANY AND KNIGHT'S CONTRACT - - North J. 287

2. —— *Compensation — Open Contract — Restrictive Covenants—Specific Performance.*

The jurisdiction to enforce specific performance with compensation for defects on a vendor, in cases where the contract is silent as to compensation, rests on the equitable estoppel referred to in *Mortlock* v. *Buller*, (1804) 10 Ves. 292, 315; 7 R. R. 417, and *Castle* v. *Wilkinson*, (1870) L. R. 5 Ch. 534, 537, namely, that where a vendor has represented and contracted to sell an estate as his own, and the purchaser has relied on the representation, the vendor cannot afterwards be heard to say he has not the entirety.

Compensation for restrictive covenants being incapable of assessment, the relief is inapplicable.

Dictum of Jessel M.R. in *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616, 618, approved and followed.

Semble, to avoid hardship the relief should be confined to cases where the actual subject-matter is substantially the same as that stated in the contract. RUDD *v.* LASCELLES Farwell J. 815

3. —— *Conditions of Sale — "Outgoings" — Notice by Sanitary Authority to abate Nuisance.*

Conditions of sale of leasehold houses provided that the purchase should be completed on August 11, 1898, and that "a purchaser paying his purchase-money is, as from that day, to be let into possession or receipt of rents and profits, and up to that date all rents, rates, taxes, and outgoings are (if necessary) to be apportioned, and each apportioned rent shall be paid on completion by each purchaser to the vendor. If, from any cause whatever, other than wilful default on the part of the vendor, the completion of the purchase is delayed beyond the beforementioned day, the remainder of the purchase-money is to bear interest at the rate of 6*l.* per cent. per annum from that day to the day of actual payment thereof, or, at the option of the vendor, he may receive the rents and profits up to the day of the actual completion of the purchase. The property shall, as from the day of sale, be at the sole risk of the purchaser, and the vendor shall not incur any liability by reason of its then or subsequently becoming or remaining untenanted, uninsured, or deteriorated." Through default of the plaintiff, who had purchased one of the lots, his purchase was not completed on August 11, although the title had then been accepted, and the defendant, the vendor, remained in possession. In November, 1898, notices were served on the defendant as "owner" by the vestry under the Public Health (London) Act, 1891 (54 & 55 Vict. c. 76), to abate nuisances on the property, and the cost of making the abatement, about 24*l.*, was paid by the defendant. In February, 1899, the plaintiff was ready to complete, and offered to pay interest at 6 per cent. on the balance of the purchase-money from August 11 on receiving the rents and profits from that date, and in that case to repay the 24*l.*, but he insisted that if the defendant retained the rents and profits he ought to bear the cost of the abatement:—

Held, that, the 24*l.* being an outgoing (*Tubbs* v. *Wynne*, [1897] 1 Q. B. 74) which from the time when a good title was shewn must clearly be borne by the purchaser in the absence of express stipulation, the plaintiff would as from August 11 have been entitled to the rents and profits and liable to pay the 24*l.*, if the conditions had not given the vendor the option to keep the rents and profits in lieu of interest, but that there was nothing to relieve the plaintiff from the obligation to pay the outgoings, and that he could only obtain specific performance on paying the 24*l.* and the balance of his purchase-money. BARSHT *v.* TAGG - - Cozens-Hardy J. 231

4. —— *Contract—Covenant for Title—Prior Document with Plan—Conveyance of Estate Term and Interest—Written Contract—Mistake—Rectification—Parol Evidence—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 7, *sub-s.* 1 (*a*).

By a conveyance expressed to be supplemental to a "principal agreement," under which the vendor was entitled to a lease of certain land coloured red in the plan annexed to that agreement, the vendor (in pursuance of a written contract in that behalf) as beneficial owner conveyed to the purchasers "all his estate term and interest under and by virtue of the principal agreement in the piece of land coloured red in the plan annexed to the principal agreement":—

Held, that the words "if any" could not be implied after the word "interest," but that the statutory covenant for title extended quoad the estate to that limited by the principal agreement, and quoad the parcels to the entirety shewn in the plan.

Delmer v. *M'Cabe*, (1863) 14 Ir. C. L. Rep. 377, explained.

The parcels being deficient, the purchasers

VENDOR AND PURCHASER—*continued.*

sued on the covenant. The vendor alleged mutual mistake, and alternatively unilateral mistake on his own part, and counter-claimed for rectification of the conveyance:—

Held, that, the written contract and conveyance being unambiguous, parol evidence of mistake was inadmissible after completion either as a defence to the action, to which it afforded no answer: *Cato* v. *Thompson*, (1882) 9 Q. B. D. 616; *Page* v. *Midland Ry. Co.*, [1894] 1 Ch. 11; or to support the counter-claim, which amounted to claiming specific performance of a written contract with a parol variation: *Davies* v. *Fitton*, (1842) 2 D. & War. 225.

Semble, *Harris* v. *Pepperell*, (1867) L. R. 5 Eq. 1, *Garrard* v. *Frankel*, (1862) 30 Beav. 445, and *Paget* v. *Marshall*, (1884) 28 Ch. D. 255, can only be supported on the ground of fraud; in the absence of fraud vendors or purchasers of land cannot be put to their election to rescind or accept rectification, on the ground of unilateral mistake. MAY *v.* PLATT - **Farwell J. 616**

5. —— *Freehold Premises—Restrictive Covenant Prohibiting Sale of Beer and Spirits—Continuing Covenant Broken for an Uninterrupted Period of Twenty-four Years—Waiver.*

By a conveyance dated in 1874, a certain plot of land was conveyed subject to a covenant that no dwelling-house, shop, or other building to be erected on the land should at any time thereafter be used as an inn, tavern, or beer-house.

Shortly after the date of the conveyance beer and spirits were sold in one of the houses erected on the land, and continued to be openly sold for upwards of twenty-four years:—

Held, in an action by a purchaser to rescind a contract for sale of that house on the ground of the existence of this restrictive covenant, that it must be presumed from the uninterrupted user of the premises as a beerhouse for twenty-four years, that there had been a waiver or release of the covenant.

Gibson v. *Doeg*, (1857) 2 H. & N. 615, discussed and followed. HEPWORTH *v.* PICKLES **Farwell J. 108**

6. —— *Leasehold Premises—Forfeiture Clause of Premises Used as an Inn, Alehouse, or Spirit Shop—Premises Uninterruptedly Used as a Public-house for upwards of Thirty Years—Waiver.*

Summons by a purchaser of certain leasehold premises which had been sold under an Order of the Court, asking that she might be discharged from her purchase.

The premises, together with other premises, were held under a lease from the Corporation of Newcastle, which contained a clause of forfeiture if the premises should at any time be used as an inn, alehouse, or spirit shop.

It appeared from the evidence that the premises had, with the knowledge of the corporation, been uninterruptedly used as a public-house for upwards of thirty years, and were so used at the time of the sale:—

Held, that the purchaser got a good title. *In re* SUMMERSON. DOWNIE *v.* SUMMERSON **Romer J. 112, n.**

VENDOR AND PURCHASER—*continued.*

7. —— *Setting aside Sale—Sale by Liquidator of Undertaking of Company—Fiduciary Relation—Concealment—Liability of Liquidator—Account of Profits—Interest on Profits.*

Upon the setting aside of a sale by a trustee of trust property to himself, and the reconveyance of the property to the beneficiaries, it is not the practice of the Court to charge the trustee with interest on the rents and profits received by him since the date of the sale.

The practice is correctly stated in Lewin on Trusts, 10th ed. p. 558.

Where a liquidator sold the undertaking of the company nominally to a new company, but really to himself, and the sale was set aside on the ground of concealment, and the property ordered to be reconveyed to the old company:—

Held, that the liquidator and the new company were not chargeable with interest on profits received by them from the business of the new company and withdrawn by them from the business. SILKSTONE AND HAIGH MOOR COAL COMPANY *v.* EDEY - - **Stirling J. 167**

8. —— *Specific Performance—Property used as a Disorderly House—Rescission of Contract.*

Property sold by auction under the description of an eligible freehold property for investment, comprising a house and shop let on a quarterly tenancy, was discovered before completion to be used by the tenant as a disorderly house. Neither the vendors nor the purchaser knew previously that the house was being improperly used. The agreement of tenancy contained a covenant by the tenant not to use the house as a disorderly house, and a proviso for re-entry in case of breach of covenant:—

Held, (1.) (reversing Cozens-Hardy J., [1899] 1 Ch. 879) that specific performance ought not to be granted, inasmuch as the purchaser, unless he took steps to prevent the improper use of the property by the tenant, would become liable as lessor to criminal proceedings under the Criminal Law Amendment Act, 1885, by reason of the state of the property at the time of the sale; (2.) (affirming Cozens-Hardy J.) that this was not a ground for rescission of the contract.

Lucas v. *James*, (1849) 7 Hare, 410, distinguished. HOPE *v.* WALTER - - **C. A. 257**

9. —— *Title—Conveyance—Concurrence of all Executors—Real Estate—Land Transfer Act*, 1897 (60 & 61 *Vict. c.* 65), *s.* 1; *s.* 2, *sub-s.* 2; *s.* 24, *sub-s.* 2.

Where a testator dies subsequently to the Land Transfer Act, 1897, having appointed executors, his real estate vests in all the executors, and not only in those who prove the will or act in the administration of the estate; and the executors who have proved the will cannot convey the legal fee simple without the concurrence of their co-executor who has not proved. *In re* PAWLEY AND LONDON AND PROVINCIAL BANK - - - - **Kekewich J. 58**

10. —— *Title—Sale under Order of Court—Protection of Purchaser—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 70, *sub-s.* 1.

Sect. 70, sub-s. 1, of the Conveyancing Act,

VENDOR AND PURCHASER—*continued.*

1881, which provides that "an order of the Court under any statutory or other jurisdiction shall not as against a purchaser be invalidated on the ground of (inter alia) want of jurisdiction," does not operate to give a good title to a purchaser at a sale under an order of the Court when the Court in making the order supposed that it was dealing with an interest belonging to a judgment debtor, though it in fact belonged to a person not a party to the proceedings and not bound by them.

Under such circumstances, notwithstanding the order of the Court and the provisions of s. 70, that person has a good title as against the purchaser.

Decision of Romer J., [1899] 1 Ch. 611, affirmed. JONES *v.* BARNETT - **C. A. 370**

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VOIDABLE CONTRACT—Lunatic—Contract to purchase real estate—Completion of purchase by committee—Conversion
See LUNACY. 1. **588**

VOLUNTARY GIFT—*Innocent Misrepresentation of Fact—Common Mistake—Equitable Right of Donor to Recover.*

When a voluntary gift is obtained by means of an innocent misrepresentation of fact by the donee, the donor, on the discovery of the mistake, has a right in equity (though he may have none at law) to recover his gift.

Wilson v. *Thornbury*, (1875) L. R. 10 Ch. 239, 249, not followed in this respect. *In re* GLUBB. BAMFIELD *v.* ROGERS - - - **C. A. 354**

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WASTE—*Landlord and Tenant—Sub-demise for Purpose of Rubbish Shoot—Alteration of Nature of Demised Premises—Public Health Acts Amendment Act*, 1890 (53 & 54 *Vict. c.* 59), *s.* 25.

By a lease dated September 29, 1830, the plaintiffs' predecessors in title granted to the defendant company twelve acres of meadow land forming part of marshy land at West Ham, for ninety-nine years, at a certain rent, for the purpose of constructing a reservoir. The company

WASTE—*continued.*

did not construct a reservoir but used the land for grazing purposes down to 1896, when they sub-demised it to B. for the rest of the term less the last three days thereof at an increased rent, for the purpose of its being used by him as a rubbish shoot. B. took possession and shot quantities of hard and soft rubbish of all kinds on the land, thereby raising its surface about ten feet. The plaintiffs brought an action against the company and B., alleging that the acts of B. constituted waste and had been done with the authority of the company, and claiming an injunction restraining the bringing or permitting to be brought upon the demised land any rubbish, earth, or material, or otherwise committing waste thereon, and damages. The only value of the lands at the end of the term would be for building factories, to obtain a proper foundation for which it would be necessary to dig down to the original level of the land:—

Held, applying the test as to what is waste laid down in *Lord Darcy* v. *Askwith*, (1617) Hob. 234, that there had been such an alteration of the thing demised—irrespective of the question whether the added material was offensive or inoffensive—as to constitute waste; that it was no answer that the expense of digging down to obtain a proper foundation would be more than compensated by the increased rent which the reversioners would be able to obtain for the land in its heightened condition; that both defendants were liable in damages for the past acts of waste; and that they must be restrained from committing waste in the future.

Queen's College, Oxford v. *Hallett*, (1811) 14 East, 489; 13 R. R. 293, observed upon. WEST HAM CENTRAL CHARITY BOARD *v.* EAST LONDON WATERWORKS COMPANY **Buckley J. 624**

—— Leaseholds - - - - **160**
See TENANT FOR LIFE AND REMAINDERMAN. 3.

WAY—*Right of Way—"Claiming right thereto"—Easement—Evidence—Prescription Act*, 1832 (2 *& 3 Will.* 4, *c.* 71), *s.* 2.

From the fact that a way to a messuage had been enjoyed for more than sixty years, and a small annual payment was made for at least the last forty-four years for it, the judge inferred that the way was enjoyed under a parol licence given more than forty years ago in consideration of an annual payment:—

Held, that the owner of the messuage was for the full period "claiming right" to the way within the meaning of s. 2 of the Prescription Act; and that, in the absence of proof of enjoyment by consent or agreement in writing, an absolute right to the use of the way had been acquired. GARDNER *v.* HODGSON'S KINGSTON BREWERIES COMPANY - **Cozens-Hardy J. 592**

WIFE.
See HUSBAND AND WIFE.

WILL—*Absolute Gift—Secret Trust—Notice—Joint Tenants.*

Where a gift is made to A. and C. as joint tenants upon an alleged secret trust, the authorities have established a distinction between those cases in which the will is made on the faith of an

WILL—*continued.*

antecedent promise by A. that he will carry out the testator's wishes, and those cases in which the will is left unrevoked on the faith of a subsequent promise by A. In the former case the trust binds both A. and C.; *Russell* v. *Jackson*, (1852) 10 Hare, 204; *Jones* v. *Badley*, (1868) L. R. 3 Ch. 362. In the latter case A., and not C., is bound: *Burney* v. *Macdonald*, (1845) 15 Sim. 6; *Moss* v. *Cooper*, (1861) 1 J. & H. 352. *In re* STEAD. WITHAM *v.* ANDREW **Farwell J. 237**

2. —— *Advancement — Gift within Twelve Months of Death — Ademption — Estate Duty — Account — Finance Act*, 1894 (57 & 58 *Vict. c.* 30), *s.* 2, *sub-s.* 1 (*c*); *s.* 9, *sub-s.* 1.

A testator, within one year of his death, spent 4000*l.* on the purchase of a house, which he settled on one of his daughters, and contributed 4320*l.* towards the purchase of another house for another daughter; the Court having decided that these gifts must be considered as an ademption pro tanto of the daughters' shares in the testator's residuary estate, which must be brought into account:—

Held, that the amount for which the daughters were accountable was the sums so advanced, less the amount they were liable to pay for estate duty by reason of the death of the testator within one year of the gift. *In re* BEDDINGTON. MICHOLLS *v.* SAMUEL - - **Byrne J. 771**

3. —— "*Die without Child or Children*"—*Without leaving Children—Real Estate—Executory Gift over—Construction of Will—Conveyancing Act*, 1882 (45 & 46 *Vict. c.* 39), *s.* 10.

A testator gave one-half his estate, which was principally freeholds, to the plaintiff, for her absolute use and benefit, "but should she die without child or children," then over among the defendants. The plaintiff had an infant child:—

Held, that "die without child or children" meant, die without leaving a child or children, and that the plaintiff was now absolutely entitled to one-half the estate, subject to an executory gift over in favour of the defendants, in the event of her not having any child who should survive her, or attain twenty-one in her lifetime. *In re* BOOTH. PICKARD *v.* BOOTH - **Byrne J. 768**

4. —— "*Eldest Son*" *entitled to Possession—Construction of Will.*

A will limited successive life estates in Blackacre to members of a class, other than and except an eldest or only son for the time being entitled to the possession or receipt of the rents of Whiteacre as tenant for life or a greater estate. A tenant in tail in remainder of Whiteacre joined with his father, the tenant for life, in a sale of which he had the benefit:—

Held, that on the death of his father he became an eldest son within the exception, and incapable of succeeding to a life estate in Blackacre under the limitations of the will. SHUTTLEWORTH *v.* MURRAY - **Cozens-Hardy J. 795**

5. —— *Hotchpot Clause — Rent — Set-off — Construction of Will—Real Property Limitation Act*, 1833 (3 & 4 *Will.* 4, *c.* 27), *ss.* 34, 42—*Real Property Limitation Act*, 1874 (37 & 38 *Vict. c.* 57), *s.* 1.

The effect of extinguishment of an estate in land under s. 34 of the Real Property Limitation Act, 1833, is not equivalent to a conveyance.

A testatrix gave her property among her four children, and directed that all moneys owing to her at her death for rent or otherwise by any child should be brought into hotchpot in ascertaining the share of such child. One son had acquired the fee of a farm held by him of the testatrix by non-payment of rent for more than twelve years:—

Held, that twelve years' rent in respect of the period previous to the extinguishment of the estate of the testatrix was to be brought into account in fixing the amount of that son's share. *In re* JOLLY. GATHERCOLE *v.* NORFOLK **North J. 292**

6. —— "*Issue*"—"*Children*"—*Construction.*

Where in a deed, will, or other document a word has a clear and definite meaning when used in one part, but has not when used in another, the presumption is that the word is intended to bear the same meaning in the latter case as in the former.

Twelve distinct legacies contained gifts over to the "issue" of legatees dying in the testator's lifetime. Except in the case of the eleventh legacy, the gift over in each contained words clearly restricting "issue" to "children." In the eleventh case the gift over to "issue" contained no words of restriction whatever:—

Held, reversing Kekewich J., [1899] 1 Ch. 703, that the restriction of "issue" to "children." applied to the gift over in the eleventh legacy as well as to the gifts over in the other legacies. *In re* BIRKS. KENYON *v.* BIRKS - - **C. A. 417**

7. —— *Mortgagee in Possession—Conveyancing and Law of Property Act*, 1881 (44 & 45 *Vict. c.* 41), *s.* 30—*Executor—Specific Devise by Executor beneficially entitled to Mortgage Debt.*

A mortgagee in possession of freehold houses devised and bequeathed all his estate to his wife, and appointed her his sole executrix. By a codicil to her will she devised these houses specifically:—

Held, that the mortgage debt passed to the specific devisee. *In re* CARTER. DODDS *v.* PEARSON - - - **Cozens-Hardy J. 801**

8. —— *Name and Arms Clause — Use of Surname.*

Under a name and arms clause directing a devisee to assume and use the prescribed name "alone or together" with his own family name:—

Held, that the devisee had an option to use the prescribed name either before or after his own family name, and that the use of the prescribed name before his own surname was a sufficient compliance with the terms of the devise.

D'Eyncourt v. *Gregory*, (1875) 1 Ch. D. 441, distinguished. *In re* EVERSLEY. MILDMAY *v.* MILDMAY - - - - **Byrne J. 96**

9. —— *Resulting Trust—Construction of Will—Gift in Trust — Surplus — Beneficial Gift or resulting Trust.*

A gift by will, for a particular purpose only, gives rise to a resulting trust of any surplus not required for that purpose, but a gift, subject to

WILL—*continued.*

the performance of a particular purpose, gives the donee a beneficial interest subject to that purpose.

Gift by will to donees upon trust for sale and upon trust out of the moneys to arise from such sale to pay funeral and testamentary expenses, debts, and legacies, with clauses for indemnity and reimbursement of the "said trustees." No other trusts were declared, and there was no residuary gift. The property not being exhausted by the above trusts:—

Held, that the donees did not take the surplus beneficially, but that there was a resulting trust.

King v. *Denison*, (1813) 1 V. & B. 260; 12 R. R. 227, discussed; the principles stated in *Croome* v. *Croome*, [1888] W. N. 37, 152; [1889] W. N. 156; 59 L. T. 582; 61 L. T. 814, and *Williams* v. *Roberts*, (1857) 27 L. J. (Ch.) 177; 4 Jur. (N.S.) 18, discussed and applied. *In re* WEST. GEORGE *v.* GROSE - **Kekewich J. 84**

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